87-1629

No. ——

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

NATIONAL CAN CORPORATION, *et al.*,
Appellants,

v.

STATE OF WASHINGTON DEPARTMENT OF REVENUE,
Appellee.

On Appeal from the Supreme Court of Washington

JURISDICTIONAL STATEMENT

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QUESTIONS PRESENTED

Last term, this Court held that the very same Washington state taxes involved here violated the Commerce Clause of the United States Constitution. On remand, the state's highest court refused to order refunds of those taxes, holding that this Court's decision would be applied only prospectively, even as to the parties before the Court whose rights had been adjudicated. The questions presented are:

1. Whether a state court renders this Court's decision merely advisory, in violation of Article III and the Supremacy Clause, by treating the very taxes this Court invalidated "as if . . . constitutionally collected."

2. Whether the Commerce Clause is frustrated by a state court's refusal, on remand, to apply this Court's decision to the very taxes invalidated in the decision, based on a unique "reshaping" of nonretroactivity requirements that would permit states to keep the fruits of their discrimination in virtually every case.

PARTIES TO THE PROCEEDING

Appellants before the Washington Supreme Court and this Court are business enterprises listed at App. D. The list of parents, subsidiaries, and affiliates of these enterprises required by Rule 28.1 appears at App. E.

Appellee before the Washington Supreme Court and this Court is the State of Washington, through its administrative agency, the Department of Revenue.

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JURISDICTIONAL STATEMENT

Appellants respectfully pray that this Court note probable jurisdiction to decide this appeal from the final decision of the Washington Supreme Court rendered January 28, 1988, sustaining on remand the same Washington tax statutes, applied to Appellant Taxpayers over their constitutional objections, that this Court held invalid under the Commerce Clause in *Tyler Pipe Industries, Inc. v. Washington Department of Revenue*, 107 S. Ct. 2810 (1987).

OPINIONS BELOW

The opinion of the Washington Supreme Court, reprinted at App. A, is reported at 109 Wash. 2d 878, 749 P.2d 1286 (1988).

JURISDICTION

Appellant Taxpayers appeal from the final decision of the Washington Supreme Court rendered January 28, 1988. Notice of Appeal was timely filed in the Washington Supreme Court on February 26, 1988. App. B.

The Washington Supreme Court, although addressing the same taxes invalidated by this Court's decision in *Tyler Pipe Industries, Inc. v. Washington State Department of Revenue*, 107 S. Ct. 2810 (1987), nonetheless ruled on remand that "it is as if the taxes collected pre-*Tyler* were constitutionally collected." App. 3a. Because the state court seemingly held that the statutory scheme invalidated in *Tyler* was constitutional until the moment this Court ruled it unconstitutional (*i.e.*, for purposes of the taxes in issue here), an appeal lies under 28 U.S.C. § 1257(2) (highest state court upholds validity of state statute challenged as being repugnant to the Federal Constitution). If this interpretation of the holding should be deemed incorrect, the Court is respectfully requested to treat these papers as a Petition for Certiorari and to grant the writ. 28 U.S.C. § 2103.

CONSTITUTIONAL AND STATUTORY PROVISIONS

The Commerce Clause (Art. I, § 8, cl. 3), Art. III, § 2, and the Supremacy Clause (Art. VI) of the United States Constitution and Revised Code of Washington (Wash. Rev. Code §§ 82.04.4286, 82.32.060, 82.32.150, 82.32.180) are reproduced in pertinent part at App. C.

STATEMENT OF THE CASE

This appeal is here following remand of this Court's decision in *Tyler Pipe Industries, Inc. v. Washington State Department of Revenue, supra.* That decision arose from appellant Taxpayers' actions for refund of specified taxes paid to the State of Washington. The

Taxpayers are engaged in interstate commerce: manufacturing in Washington and selling their goods in other states; manufacturing goods in other states and selling them in Washington; or a combination of these activities. The Washington Supreme Court rejected the Taxpayers' contentions that the Washington tax scheme violated the Commerce Clause.

This Court vacated the judgments of the Washington Supreme Court: "We conclude that our reasons for invalidating the West Virginia tax in *Armco* also apply to the Washington tax challenged here." *Tyler*, 107 S. Ct. at 2813, *citing Armco, Inc. v. Hardesty*, 467 U.S. 638 (1984). As *Tyler* noted, the *Armco* Court had endorsed the dissent of an earlier case involving Washington's own tax: "In explaining why the tax [in *Armco*] was discriminatory on its face, we expressly endorsed the reasoning of Justice Goldberg's dissenting opinion in *General Motors Corp. v. Washington*, 377 U.S. at 459 . . . ." *Tyler*, 107 S. Ct. at 2816. The *Tyler* Court considered its "square reliance in *Armco* on Justice Goldberg's earlier dissenting opinion . . . especially significant," explaining that it "dooms" Washington's attempt to distinguish *Armco*. 107 S. Ct. at 2817. Having already ruled inferentially on Washington's tax (through *Armco's* "square reliance" on the Goldberg dissent), this Court concluded in *Tyler* that: "Washington's B&O tax scheme is therefore inconsistent with our precedents . . . ." *Id.* at 2820.

In remanding for remedy, the Court noted the State's plea for nonretroactivity advanced on the grounds that "the taxes at issue were assessed prior to our opinion in *Armco*" and that the holding there was "not clearly foreshadowed by earlier opinions." *Id.* Because of the potential application of state law and the possible need for an expanded record, this Court concluded that it would be appropriate for the Washington court to address the refund issue "in the first instance." *Id.* at 2822-23.

On remand, the Washington Supreme Court found no need for an expanded record and conceded that Washington statutory law mandates a refund of taxes unconstitutionally collected.[1] Nevertheless, the court denied *all* refunds, adopting what it called "pure prospective application," effective from June 23, 1987, the date of the *Tyler* decision. The court did not limit its consideration of prospective application to taxes collected *before* the 1984 *Armco* decision. App. 18a.

The court below acknowledged that the "threshold" test for nonretroactivity established by this Court requires a "new principle of law" that was "not clearly foreshadowed." *Chevron Oil Co. v. Huson*, 404 U.S. 97, 106 (1971). The court purported to find such a "new" principle in *Tyler* despite (i) *Tyler's* repeated reliance on *Armco*, and (ii) the State's express admission that, immediately after *Armco*, its Department of Revenue and attorneys general had concluded that *Armco* "clearly" foreshadowed *Tyler*. On June 14, 1984, just two days after *Armco* was decided, the State's Director of Revenue wrote to Washington's Governor about the likely impact of *Armco* on Washington's B&O tax. Relying on advice from the Attorney General's office, the Director stated, in pertinent part:

> In the opinion of our attorneys the reasoning of the Court in the *Armco* decision is clearly applicable to our statutory arrangement. . . .

App. 80a (Exhibit 32). Asserting that the opinions of the Revenue Department and Attorney General were "not binding" on it, the court relied on its own erroneous decision (reversed by this Court) in which it had failed to perceive the meaning of *Armco*:

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[1] The Washington Supreme Court pronounced:

> If the taxes were collected in violation of the constitution, then the state refund statutes would mandate refunds.

App. 2a.

> Our unanimous decision . . . indicates we did not read *Armco* as foreshadowing the result in *Tyler*.

App. 5a.[2]

THE QUESTIONS PRESENTED ARE SUBSTANTIAL

These taxpayers appeal because, despite this Court's invalidation of Washington's tax, the state court held that "for the purpose of applying the refund statutes it is as if the taxes collected pre-*Tyler* were constitutionally collected." App. 3a. Refunds were denied because the very taxes invalidated by this Court in *Tyler* were deemed by the court below to be nonetheless valid. Thus, *Tyler* was rendered inoperative as to the taxes that were before this Court (as well as the identical taxes collected from these same Taxpayers to the date of *Tyler*). This is unprecedented and offensive to the mandates of both Article III and the Commerce Clause of the United States Constitution.

The proper occasion for considering prospectivity is clear under this Court's decisions. As to the parties, the Court rules on a particular set of taxes in a live case or controversy before it. When the Court holds that particular taxes were unconstitutionally collected,[3] that becomes the law of the case. The issue of prospectivity arises only in subsequent cases as to other taxpayers

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[2] Later in its opinion, however, the Court impliedly acknowledged that *Armco* did indeed foreshadow *Tyler*:

> We do not believe the *Armco* decision *so clearly* foreshadowed the outcome in *Tyler* that the State's reliance on the validity of the tax was unjustified or that prospective application would be inequitable.

App. 15a (emphasis added). The reference to "the State's reliance on the validity of the tax" is inappropriate since Exhibit 32 demonstrated that the State obviously recognized the deficiency of its tax and its refund liability.

[3] The Washington Supreme Court has conceded that Washington law mandates the refund of such taxes. App. 2a.

who have paid similar taxes. To hold that nonretroactivity applies to the very taxes adjudicated would convert this Court's ruling into an advisory opinion—*not* deciding the actual case and controversy before the Court, but declaring what should be done if some future case or controversy arises. By failing to apply this Court's *Tyler* decision to the parties and taxes before the Court in that case, the court below defeated the Article III requirement that this Court decide "cases" or "controversies," as well as the state court's Article VI obligation to respect the supremacy of this Court's decisions.

Even in a subsequent case, where consideration of nonretroactivity would be appropriate, the "usual rule" is retroactive application of decisions; however, "nonretroactivity is appropriate in certain defined circumstances." *Goodman v. Lukens Steel Co.*, 107 S. Ct. 2617 (1987), citing *Chevron, supra.*[4]

The court below "reshaped" the three requirements of *Chevron* in a way that would provide states a virtual guarantee that they can retain the fruits of discrimination against interstate commerce. If the decision below should stand as precedent, states will have no difficulty satisfying all three of the "reshaped" *Chevron* circumstances in all cases where this Court invalidates state taxes for discrimination. That error is crucial to these parties because it effectively nullifies the decision this

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[4] For example, the "threshold" requirement for nonretroactivity under *Chevron* is that the prior decision, whose application is being considered in a pending case, must have established a "new principle of law." *Chevron*, 404 U.S. at 106. In light of *Tyler*'s heavy reliance on *Armco* and earlier cases, and its conclusion that "Washington's B & O tax is . . . inconsistent with our precedents" (107 S. Ct. at 2820), the court below is patently wrong in asserting that *Tyler* established a "new principle of law" that might justify *non*retroactivity.

Court rendered to them in *Tyler;* but the broader and more lasting threat is the distortion of *Chevron's* exception to retroactivity so as to frustrate the very Commerce Clause policy this Court has sought to protect in *Tyler* and other cases. The substantial threat posed for interstate commerce will be addressed below. First, however, attention must be given to a fundamental question (which *assumes* that *Tyler* should be regarded as a new principle of law instead of a mere extension of earlier precedent): In light of Article III and the Supremacy Clause, may a state court on remand deny application of this Court's holding to the very litigants and the very taxes that were adjudicated by the Court to be unconstitutional?

I. The Decision Below Would Make This Court's *Tyler* Decision Merely Advisory.

So far as we can determine, the decision below represents the first time a state court, on remand, has refused to apply this Court's substantive constitutional determination to the parties. As such, the decision below calls into question this Court's obligation to consider only "cases" and "controversies," and to *decide* those controversies—as opposed to rendering only advisory opinions. Further, the decision below ignores the Supremacy Clause's mandate that state courts give *full* effect to this Court's pronouncements on federal constitutional matters. *Cooper v. Aaron*, 358 U.S. 1, 18 (1958); *see also* Degnan, *Federalized Res Judicata*, 85 Yale L.J. 741 (1976); Wright, Miller & Cooper, Federal Practice and Procedure § 4468 (1981).

Last term, in *Griffith v. Kentucky*, 107 S. Ct. 708 (1987), this Court ruled that Article III's "case" or "controversy" provisions require application of the Court's ruling to the parties immediately before the Court and "to all cases, state or federal, pending on direct review

or not yet final . . . ." *Id.* at 713-14, 716.[5] While the Court's prospectivity analysis has not always been the same for civil and criminal cases,[6] Article III's case or controversy limitation applies with equal force to both. See *Griffith's* analysis contrasting the Court's constitutional function of adjudicating specific cases with the role of the legislature. 107 S.Ct. at 713, *citing Mackey v. United States*, 401 U.S. 667, 679 (1971) (Harlan, J., concurring).

Well before the decisional evolution that culminated in *Griffith*, the Court observed in the civil context: "Formulation of a rule of law in an Article III case or controversy which is prospective as to the parties involved in the immediate litigation would be most unusual, especially where the rule announced was not innovative." *Simpson v. Union Oil Co.*, 396 U.S. 13, 15 (1969). Like the present case, *Simpson* began with a decision by this Court on an issue of substantive law, reserving a question of nonretroactivity. *Simpson v. Union Oil Co.*, 377 U.S. 13, 24-25 (1964). When the lower court, on remand, applied nonretroactivity to the parties,[7] this Court reversed, stating: "The question we reserved was not an invitation to deny the fruits of successful litigation to this petitioner," but was limited to "parties in other cases" and to "whether in some of those other situations" equity might warrant nonretroactivity. 395 U.S. at 14. Consistently, the hallmark case for nonretroactivity, *Chevron Oil v. Huson, supra,* did not involve the litigants

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[5] This includes the cases of those, like amici curiae Amcord, Inc., *et al.*, in *Tyler*, who have filed suit under the same theory but whose actions were stayed until a definitive ruling in the lead case.

[6] *See Griffith*, 107 S.Ct. at 713 n.8, *citing United States v. Johnson*, 457 U.S. 537, 563 (1982).

[7] 270 F. Supp. 754, 757 (N.D. Cal. 1967), *aff'd*, 411 F.2d 897 (9th Cir. 1969).

who established the substantive principle of law to be applied.[8]

Last term, when the rule of a case resulted in a new, shortened period of limitations, the rule was applied retroactively to the parties. *Goodman v. Lukens Steel Co.*, 107 S. Ct. 2617 (1987).[9] While the Court's opinion focused on the absence of the requisite "threshold" of *Chevron* (a "new principle of law"), *id.* at 2621-22, Justice O'Connor's concurrence emphasized Article III policy. Expressing doubt whether the Court's decision should be given *general* retroactive effect, Justice O'Connor agreed that "the Court should adhere to its policy of applying the rule it announces to the parties before the Court." *Id.* at 2636 (O'Connor, J., concurring on the retroactivity issue),[10] *citing Stovall v. Denno*, 388 U.S. 293, 301 (1967).

In *Stovall*, a principle established earlier in *United States v. Wade* [11] and *Gilbert v. California* [12] was held not to apply retroactively to an alleged exclusionary error raised in Stovall's habeas proceeding. However, Justice Brennan, writing for the Court, confirmed the "command of Article III" that the parties in *Wade* and *Gilbert* be given the benefit of the principle established in their cases as "an unavoidable consequence of the necessity

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[8] The substantive principle of law sought to be applied in *Chevron* was established in *Rodrigue v. Aetna Casualty & Surety Co.*, 395 U.S. 352 (1969).

[9] *See also Al-Khazraji v. St. Francis College*, 107 S. Ct. 2022 (1987), applying nonretroactivity to the shortened limitations period as to other parties.

[10] *See also* Justice Powell's opinion, joined by Justices O'Connor and Scalia, agreeing that "the Court's ruling on the statute of limitations questions should apply to the parties in this case." 107 S. Ct. at 2631 (Powell, J., concurring in part).

[11] 388 U.S. 218 (1967).

[12] 388 U.S. 263 (1967).

that constitutional adjudications not stand as mere dictum." 388 U.S. at 301.[13] *Accord Desist v. United States*, 394 U.S. 244, 254 n.24 (1969).

II. The Decision Below Undermines the Decisions of This Court That Seek To Protect Interstate Commerce From State Tax Discrimination.

Were nonretroactivity to be considered for possible application to the parties—a result clearly not countenanced by Article III or this Court's precedents—the test would be that of *Chevron Oil Co. v. Huson*, 404 U.S. 97 (1971). The court below has "reshaped" the three-part test of *Chevron* to provide a virtual guarantee that states can keep the fruits of their discrimination—the "fruits of defeat."

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[13] The Court, speaking through Justice Brennan again in *Northern Pipeline Construction Co. v. Marathon Pipe Line Company*, 458 U.S. 50 (1982) (invalidating the Bankruptcy Act of 1978 but applying *Chevron* to stay the judgment until Congress could enact a new law), acknowledged once more the necessity of nonetheless applying the decision of the case to the parties: "It is clear that, at the least, the new bankruptcy judges cannot constitutionally be vested with jurisdiction to decide this state-law contract claim against Marathon." *Id.* at 87 n.40.

Unlike this Court, however, some Courts of Appeal have evidenced confusion about the Article III mandate. *Compare United States v. Cocke*, 399 F.2d 433, 451-52 (5th Cir. 1968), *cert. denied*, 394 U.S. 922 (1969) (" 'Pure prospectivity,' even if constitutionally permissible, must be a matter of judicial grace sparingly invoked"), *with Ettinger v. Central Penn. National Bank*, 634 F.2d 120, 123-24 (3d Cir. 1980) ("Although we recognize that the Supreme Court has expressed reservations about applying a decision purely prospectively, *see Stovall v. Denno* . . . [W]e . . . reject the argument by amicus that Article III circumscribes the effect a federal court may give to its decisions"), and *Garcia v. San Antonio Metropolitan Transit Authority*, 838 F.2d 1411 (5th Cir. 1988). *Garcia*, however, seemingly misread this Court's treatment of the parties in *Northern Pipeline* and erroneously understood *Chevron* as a case involving the actual parties to a decision creating a new principle of law. *See* note 8, *supra*.

The eagerness of other state courts to advance state revenue interests in similar fashion—at the expense of interstate commerce—underscores the importance of the question presented. The decision below (and its peculiar version of *Chevron*) already has been embraced by the Arkansas Supreme Court to deny refunds of taxes paid both before *and after* this Court's decision in *American Trucking Associations, Inc. v. Scheiner*, 107 S. Ct. 2829 (1987).[14] The Arkansas court refunded only limited amounts paid into escrow under an order entered by Circuit Justice Blackmun.[15] Incredibly, the State was deemed not to have been "put on notice" by *Scheiner* that the taxpayers' claims were likely to succeed on the merits—even though this Court had vacated (on the basis of *Scheiner*) the prior Arkansas state court decision upholding the constitutionality of its tax.[16]

Other states have similarly profited from their discrimination.[17] If allowed to stand, the Washington

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[14] *American Trucking Associations v. Gray*, No. 85-101, 1988 Westlaw 21852 (Ark. Mar. 14, 1988).

[15] *American Trucking Associations, Inc. v. Gray*, 108 S. Ct. 2 (1987) (Blackmun, Circuit Justice).

[16] *American Trucking Associations, Inc. v. Gray*, 107 S. Ct. 3252 (1987).

[17] The inclination of state courts to apply *Chevron* for purely revenue protection purposes is evidenced by other recent state tax refund cases. *See, e.g., Penn. Mut. Life Ins. v. Dept. of Licensing and Reg.*, 162 Mich. App. 123, 412 N.W.2d 668 (1987) (tax invalidated on equal protection grounds based on this Court's decision in *Metropolitan Life Ins. Co. v. Ward*, 470 U.S. 869 (1985)); *Ashland Oil, Inc. v. Rose*, 350 S.E.2d 531 (W. Va. 1986), *appeal dismissed*, 107 S. Ct. 1949 (1987) (tax invalidated on Commerce Clause grounds based on this Court's *Armco* decision); *Metropolitan Life Ins. Co. v. Dept. of Ins.*, 373 N.W.2d 399 (N.D. 1985) (tax invalidated on equal protection grounds based on *Metropolitan Life Ins. Co. v. Ward, supra*); *Division of Alcoholic Beverages & Tobacco v. McKesson Co.*, No. 70368, 1988 Westlaw 12553 (Fla.

court's distortion of *Chevron* will encourage states to persist in discrimination for as long as possible, because they can readily satisfy the "reshaped" *Chevron* test in all cases where this Court invalidates state taxes for discrimination.

A. The Threshold Test: New Principle of Law.

Chevron's "new principle of law" [18] or "clear break" with precedent requirement is the "threshold" test in nonretroactivity cases. *United States v. Johnson*, 457 U.S. 537, 550 n.12 (1982). In the decision relied upon in *Chevron* for this threshold requirement, the Court declined to find the requisite "sharp break" from prior precedent in the absence of "such an abrupt and fundamental shift in doctrine as to constitute an entirely new rule which in effect replaced an older one." *Hanover Shoe, Inc. v. United Shoe Machinery Corp.*, 392 U.S. 481, 498 (1968). The Court contrasted the more usual development in the law based "to a great extent" on precedent, and thus merely an "*extension* of doctrines which had been growing and developing over the years." *Id.* at 499 (emphasis added).

Feb. 18, 1988), *rehearing pending* (tax invalidated on Commerce Clause grounds based on *Bacchus Imports, Ltd. v. Dias*, 468 U.S. 263 (1984)).

In contrast to *Tyler*, these cases were not on remand, to provide a remedy as to a tax declared unconstitutional by this Court. Unlike Article III courts, state courts may be permitted by state constitutions to issue purely prospective, advisory opinions, at least when federal rights are not at stake. *Great Northern Ry. v. Sunburst Oil & Ref. Co.*, 287 U.S. 358, 364 (1932).

[18] A prior decision "must establish a new principle of law, either by overruling clear past precedent on which litigants may have relied . . . or by deciding an issue of first impression whose resolution was not clearly foreshadowed." *Chevron*, 404 U.S. at 106. If the threshold requirement is not met, the analysis ends without resort to the other two tests of *Chevron*, as the court below recognized. App. 4a.

The court below found that *Tyler* was a clear break from this Court's prior decisions, including *Armco*, despite *Tyler's* express reliance on those precedents. *See, e.g.*, 107 S. Ct. at 2816 ("This statutory exemption . . . has the *same facially discriminatory consequences* as the West Virginia exemption we invalidated in *Armco*.") (emphasis added).[19] Indeed, in *Tyler* the Court noted that it had expressly referenced Washington's tax in its *Armco* opinion.[20] 107 S. Ct. at 2817. Washington once had a tax much like the West Virginia tax invalidated in *Armco*. Washington's own court struck it down in *Columbia Steel Co. v. State*, 30 Wash. 2d 658, 192 P.2d 976 (1948). But, as *Tyler* observed: "Two years later, in 1950, the Washington legislature responded to [*Columbia Steel*] by turning the B & O tax exemption scheme inside out." 107 S. Ct. at 2814. The Court in *Armco* readily saw through the facade of Washington's new "inside-out" tax. *Armco* adopted an earlier opinion, *General Motors Corp. v. Washington*, 377 U.S. 436, 459 (1964) (5-4) (Goldberg, J., dissenting),[21] addressing Washington's new scheme. 467 U.S. at 462. As this Court noted in *Tyler*, Justice Goldberg's analysis (which expressly addressed Washington's tax *after* it had been turned "inside out"), recognized the new tax as having

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[19] Far from being "new," even *Tyler*'s particular application of the principle that it applied (state taxes may not discriminate against interstate commerce) has been settled at least since *Maryland v. Louisiana*, 451 U.S. 725 (1981), and *Armco, supra*. Other express references to the linkage between *Tyler* and *Armco* can be found at 107 S. Ct. at 2818, 2820. *See* note 4, *supra*.

[20] The State of Washington had anticipated that the validity of its taxes would be affected by the Court's decision in *Armco* and had, therefore, filed an amicus brief in this Court. In it, Washington represented that its taxes remained "very similar to the West Virginia tax" struck down in *Armco*. Brief of the State of Washington as Amicus Curiae at 1, *Armco, Inc. v. Hardesty*, 467 U.S. 638 (1984).

[21] Justices White and Stewart joined in Justice Goldberg's opinion.

the same economic effects as Washington's West Virginia-style tax previously struck down in *Columbia Steel*. 377 U.S. at 459, *quoted in Armco*, 107 S. Ct. at 2816. The Court concluded in *Tyler* that its "square reliance" in *Armco* on the Goldberg dissent doomed Washington's inside-out maneuver, as well. 107 S. Ct. at 2817.[22]

The court below nonetheless concluded "that *Tyler* did establish a new principle of law . . . ." App. 11a. The court thus lowered the "threshold" requirement of *Chevron* to the vanishing point. This Court's express reliance on *Armco*, *Maryland v. Louisiana*,[23] and *Boston Stock Exchange v. State Tax Comm'n*[24] (*see* 107 S. Ct. at 2816-20), was ignored, as was Washington's own participation in *Armco* as *amicus curiae*. The court below turned a blind eye to the admission of Washington's Department of Revenue that "the reasoning of the Court in *Armco* is clearly applicable to our statutory arrangement." App. 80a. (Ex. 32; Memorandum from Director

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[22] As the Court explained:

> Our square reliance in *Armco* on Justice Goldberg's earlier dissenting opinion is especially significant because that dissent dooms [Washington's] efforts to limit the reasoning of *Armco* to the precise statutory structure at issue in that case.

107 S. Ct. at 2817. *Tyler* thereupon invalidated the inside-out scheme for the same reasons that the old scheme had been struck down in 1948:

> The current B & O tax exposes manufacturing or selling activity outside the state to a multiple burden . . . . The fact that the B & O tax "has the advantage of appearing nondiscriminatory," see *General Motors Corp.*, 377 U.S., at 460 . . . (Goldberg, J., dissenting), does not save it from invalidation. . . .

107 S. Ct. at 2820. The Court expressly dismissed the plurality decision in *General Motors* (which did not address the issue of discrimination against interstate commerce, nor involve the validity of Washington's manufacturing tax) as "not a controlling precedent." *Id.* at 2817.

[23] 451 U.S. 725 (1981).

[24] 429 U.S. 318 (1977).

of Revenue, on counsel of Attorney General's Office, to Governor of the State of Washington, dated June 14, 1984). Instead, the Washington court relied on *its own subjective failure* to see that the *Tyler* issues were controlled by *Armco*, *Maryland v. Louisiana*, and other prior decisions expressly relied upon by the Court in *Tyler*. According to the court below: "*Our* unanimous decision [in 1986] indicates *we* did not read *Armco* as foreshadowing the result in *Tyler*." App. 5a (emphasis added).

Every state court that has been (or will be) reversed can find a "new principle of law" by applying such a test.[25] The decision below would, therefore, render *Chevron*'s threshold requirement a nullity. The question whether this Court has established a new principle of Commerce Clause law must be resolved by this Court's standards, not by the wholly subjective (and erroneous) perceptions of the very state court whose decision was reversed. Otherwise, there is nothing to prevent revenue-conscious state courts from turning this Court's Commerce Clause decisions into hollow advisory opinions under the guise of "prospective application."

B. Purpose Test: Whether Retrospective Application of a Rule Would Further or Retard Its Operation.

In those few instances where the threshold for nonretroactivity is met—where there really is a clear break with past precedent—the court must then weigh the merits and demerits of retroactivity "by looking to the prior history of the rule in question, its purpose and effect, and whether retrospective operation will further or retard its operation." *Chevron*, 404 U.S. at 107.

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[25] All of the recent decisions in which this Court has been obliged to invalidate discriminatory state taxes (except one original action, *Maryland v. Louisiana*, *supra*) have involved reversals of decisions in which the state court was unable to perceive the discrimination. *See* cases cited in note 26.

The lower court's lip service to *Chevron's* second test also raises a substantial federal question in this case, because the rule whose application is denied is a Commerce Clause decision of this Court.[26] The court below was untroubled by *Chevron's* purpose test, reasoning that "whatever chill was imposed on interstate trade is in the past." App. 11a. It refused to acknowledge the incentive that its decision offers to future discrimination. States can hardly fail to see that if they persist in discriminatory taxation, they can retain all the fruits of that discrimination, because they are a product of the "past." [27]

Washington's own conduct is a case in point. After *Columbia Steel* struck down its West Virginia-style tax in 1948, Washington turned the tax "inside-out" without changing its economic substance. Then, when *Armco* so obviously "doom[ed]" Washington's "inside-out" tax that the State's Director of Revenue and counsel were forced to acknowledge it (see App. F), the State consciously persisted in defending the "doom[ed]" tax and harvesting the fruits of discrimination for three more years.

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[26] The importance of Commerce Clause protection against taxes favoring local over interstate commerce is emphasized by the frequency with which this Court has had to provide such protection. Currently, the Court has before it the appeal in *Goldberg v. Johnson*, 512 N.E.2d 1262 (Ill. 1987), *prob. juris. noted sub nom. Goldberg v. Sweet*, 108 S. Ct. 1010 (1988); and *New Energy Co. of Indiana v. Limbach*, 32 Ohio St. 3d 206, 513 N.E.2d 258, *prob. juris. noted*, 108 S. Ct. 500 (1987). In recent years, in addition to *Tyler*, such protection has been necessary in *Boston Stock Exchange v. State Tax Commission*, 429 U.S. 318 (1977); *Maryland v. Louisiana*, 451 U.S. 725 (1981); *Westinghouse Electric Corp. v. Tully*, 466 U.S. 388 (1984); *Bacchus Imports, Ltd. v. Dias*, 468 U.S. 263 (1984); *Armco, Inc. v. Hardesty*, 467 U.S. 638 (1984); and *American Trucking Associations v. Scheiner*, 107 S. Ct. 2829 (1987); *Cf. Arizona Public Service Co. v. Snead*, 441 U.S. 141 (1979).

[27] *See, e.g., American Trucking Ass'n v. Gray*, —— S.W.2d ——, 1988 Westlaw 21852 (Ark. Mar. 14, 1988).

If states can so easily retain, and even increase, their gains from discrimination, Commerce Clause "protection" is rendered meaningless. Discrimination against interstate commerce becomes profitable and risk free.

Equally important, the decision below "deprives the litigants, who have sustained the burden of attacking an unconstitutional statute, of the fruits of their victory" and may "discourage challenges to statutes of questionable validity." *Rio Algom Corp. v. San Juan County*, 681 P.2d 184, 186 (Utah 1984) (taxes refunded to the taxpayers who were parties). *Accord Strickland v. Newton County*, 244 Ga. 54, 258 S.E.2d 132, 134 (Ga. 1979) ("the plaintiff counties in these suits are entitled to the fruits of the holding that this Act is unconstitutional"); *see also Stovall v. Denno*, 388 U.S. 293, 301 (1967) (considering "the possible effect upon the incentive of counsel to advance contentions requiring a change in the law"). Taxpayers will seldom take the lead in attacking even the most blatantly unconstitutional tax if the litigating taxpayer is to be deprived of the fruits of the victory.

C. Inequity Test: Whether This Court's Decision Would Produce Inequitable Results If Applied Retroactively.

Finally, *Chevron* requires a weighing of any "inequity imposed by retroactive application." 404 U.S. at 107. The legitimate inquiry here is whether past events cannot be unwound without "injustice or hardship," *Id.*, *citing Cipriano v. City of Houma*, 395 U.S. 701, 706 (1969) (invalidating bonds issued under an unconstitutional law; applying the decision to the parties, other pending cases timely commenced, and other bond issues that could still be timely challenged; but giving prospective application as to bond issues for which the statutory time for challenge had expired).

The court below applied this test by asserting that "the expenditures made from this revenue during the many years for which refunds are sought cannot be undone . . . ." App. 15a.[28] Obviously, this will be so in every case where a state requires, as Washington does, that taxes must be paid *before* they can be contested in court. *See* Wash. Rev. Code § 82.32.150. The Washington courts denied injunctions against collection of the taxes prior to contest on the ground that the Taxpayers' right to refunds would be an adequate remedy if they prevailed on the constitutional issues. *See, e.g., Tyler Pipe Industries, Inc. v. Department of Revenue*, 96 Wn.2d 785, 786, 791, 638 P.2d 1213, 1214, 1216 (1982). When the Taxpayers did prevail, however, the state court denied them their refunds. Paying refunds of the taxes that had accumulated was thought to be a "hardship" and the taxpayers were deemed to have paid with "notice" of that result. App. 14a.

By insisting that taxes be paid before contest, the State created its own "hardship" that taxpayers were powerless to prevent. The weighing of equities per *Chevron* has been reduced to a "Catch 22" stratagem under

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[28] In considering this equity prong, the court below has focused on a false issue. Dollars are fungible. (That fungibility is the justification for denying injunctions of tax collection, in favor of requiring payment with the right to obtain a refund of invalid taxes.) Therefore, whether the state can recover dollars it has spent is not the issue. The issue is whether the state is capable of repaying the amounts at stake to the taxpayers who were injured by being required to pay discriminatory taxes. In this case, the state has represented that it "has never claimed that it could not pay refunds" but only argued "that it would be inequitable" to require them. Brief of Respondent to Washington Supreme Court on Remand from the United States Supreme Court at 44. At any rate, any hardship involved in the state making a refund is precisely equal in amount to the hardship the state has imposed on the taxpayer by collecting the unconstitutional tax. Even if neither party were at fault, such a hardship should not be borne by the taxpayer who was the victim of the discrimination, but by the state, which created it.

which the state always wins. That will be the inevitable result in cases applying the Commerce Clause to state taxes.

It becomes apparent that all three *Chevron* tests will invariably be met in state tax discrimination cases, if applied as the court below did. A "new principle" will be found whenever a state court has failed to anticipate, appreciate, or understand the decision of this Court. When, as usual, a state has required taxpayers to pay taxes before contesting them, the "chill" on interstate commerce will always be in the "past." Revenues already spent will never be capable of being "undone" without "hardship." If the decision below is allowed to stand, tax discrimination against interstate commerce will be risk-free and profitable. This Court's decisions striking down invalid laws will be rendered advisory in effect by failing to remedy past discrimination and, if applied only prospectively, will be ineffectual to deter states from imposing taxes that discriminate against interstate commerce.

CONCLUSION

For the reasons expressed above, this Court should note probable jurisdiction and reverse the decision below.

Respectfully submitted,

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APPENDICES

APPENDIX A

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

Nos. 51910-2 and 51110-1

NATIONAL CAN CORPORATION, *et al.*,
Appellants,

v.

THE DEPARTMENT OF REVENUE,
Respondent.

TYLER PIPE INDUSTRIES, INC.,
Appellant,

v.

THE DEPARTMENT OF REVENUE,
Respondent.

EN BANC OPINION

Filed January 28, 1988

UTTER, J.—This is a remand from the United States Supreme Court where various commercial enterprises (taxpayers) claimed Washington's multiple activities exemption to the business and occupation (B & O) tax, RCW 82.04.440, discriminated against interstate commerce in violation of the commerce clause, U.S. Const. art. 1, § 8. In *Tyler Pipe Indus., Inc. v. Department of Rev.*, — U.S. —, 97 L. Ed. 2d 199, 107 S. Ct. 2810 (1987) (hereinafter *Tyler*) the United States Supreme Court vacated and remanded this court's decisions in *Tyler Pipe Indus., Inc. v. Department of Rev.*, 105 Wn.2d

318, 715 P.2d 123 (1986) (hereinafter *Tyler Pipe*) and *National Can Corp. v. Department of Rev.*, 105 Wn.2d 327, 715 P.2d 128 (1986) (hereinafter *National Can*). In *Tyler Pipe* and *National Can*, this court held Washington's B & O tax exemption was valid under the commerce clause in that (1) there was a sufficient nexus between the interstate activities and the State, (2) it was fairly apportioned, (3) it was fairly related to the services provided, and (4) it did not discriminate against interstate commerce. The United States Supreme Court held there was sufficient nexus, and the tax was fairly apportioned, but found the multiple activities exemption discriminated against interstate commerce. The Court then remanded to this court to decide the refund issues raised by its ruling.

The decisive issues before this court are whether state law mandates refunds, and if not, whether this is an appropriate case for prospective application. We hold state law does not require refunds, and prospective application is appropriate.

I

STATE LAW

In order to reach the retroactivity issue, this court must first decide if Washington state statutory law or state case law mandates refunds of taxes paid prior to the Supreme Court's *Tyler* decision. If this state's tax refund statutes, RCW 82.04.4286 and RCW 82.32.060 apply, then all other issues are irrelevant.

This court has stated that, if a tax were in violation of the due process or commerce clauses, it would also be in violation of former RCW 82.04.430(6) (subsequently recodified as RCW 82.04.4286). *Chicago Bridge & Iron Co. v. Department of Rev.*, 98 Wn.2d 814, 819, 659 P.2d 463, *appeal dismissed*, 464 U.S. 1013 (1983). However, taxpayers' argument based on *Chicago Bridge* misconstrues the more basic inquiry at issue here. If the taxes

were collected in violation of the constitution, then the state refund statutes would mandate refunds. However, if the court finds the *Tyler* holding is to be applied only prospectively, then for the purposes of applying the refund statutes it is as if the taxes collected pre-*Tyler* were constitutionally collected. The statutory argument ignores the very meaning of prospective application. Washington case law does not support the proposition that tax refunds are always mandated when a statutory scheme is found to be unconstitutional. This court recently found a part of Washington's sales tax to be unconstitutional and yet gave only prospective application to its decision and afforded no refunds to taxpayers. *Bond v. Burrows*, 103 Wn.2d 153, 690 P.2d 1168 (1984). *See also Cascade Sec. Bank v. Butler*, 88 Wn.2d 777, 786, 567 P.2d 631 (1977); *State ex rel. State Fin. Comm. v. Martin*, 62 Wn.2d 645, 673, 384 P.2d 833 (1963).

II

RETROACTIVE OR PROSPECTIVE APPLICATION OF *TYLER*

Since Washington law does not foreclose an inquiry into prospective application, we turn to the factors enunciated by the United States Supreme Court to determine whether prospective application is to be afforded in this case. *Chevron Oil Co. v. Huson*, 404 U.S. 97, 30 L. Ed. 2d 296, 92 S. Ct. 349 (1971) sets out the three factors to be considered in deciding whether to give retroactive or prospective effect to a new rule in a federal civil case. *Tyler*, 107 S. Ct. at 2822. Courts must (1) determine whether the decision establishes a new principle of law either by overruling clear past precedent on which litigants may have relied, or by deciding an issue of first impression whose resolution was not clearly foreshadowed; (2) weigh the merits and demerits in each case by looking to the prior history of the rule in ques-

tion, its purpose and effect and whether retrospective operation will further or retard its operation; and (3) weigh the inequity imposed by retroactive application. *Chevron Oil*, at 106-07. (Although the tests for retroactive application in criminal cases have recently been reworked, the inquiry in civil cases is still controlled by *Chevron Oil*. *Griffith v. Kentucky*, —— U.S. ——, 93 L. Ed. 2d 649, 107 S. Ct. 708 (1987).)

A

NEW PRINCIPLE OF LAW

The threshold factor necessary for prospective application is a finding that the *Tyler* decision established a new principle of law overruling past precedent on which litigants may have relied. *Chevron Oil*, 404 U.S. at 106. This court's unanimous decisions in *National Can* and *Tyler Pipe*, the long line of cases upholding the Washington B & O tax, the fact that *Tyler* overruled past precedent on which the states may have relied, and Justice Scalia's dissent in *Tyler*, all compel the conclusion that *Tyler* did establish new principles of law.

In 1984 the United States Supreme Court invalidated West Virginia's wholesale gross receipts tax because it discriminated against interstate commerce. *Armco Inc. v. Hardesty*, 467 U.S. 638, 81 L. Ed. 2d 540, 104 S. Ct. 2620 (1984). In *National Can*, this court distinguished *Armco* based on the belief that Washington's selling and manufacturing taxes were exacted to address the same state burdens and hence were compensatory and therefore substantially equivalent. This court distinguished West Virginia's tax (which imposed substantially different tax rates on manufacturing and on wholesaling) from Washington's tax (which imposed identical rates on each activity), and reasoned that this difference was one reason which had precluded the Supreme Court from finding the West Virginia taxes to be compensatory.

We further held that the "internal consistency" rule is not applicable to a determination of discrimination in a gross receipts tax case. It was our belief that the Court in *Armco* had used the internal consistency concept only in the determination of whether Armco Inc. had to show actual harm once it had demonstrated the tax was facially discriminatory. For this reason we held the Washington tax was not facially discriminatory, and relied on previous holdings of the United States Supreme Court which had upheld Washington's B & O tax against commerce clause challenges and which were not expressly overruled in *Armco*.

The Supreme Court held, however, that the multiple activities exemption was facially discriminatory, and that manufacturing and wholesaling are not substantially equivalent activities. *Tyler*, 107 S. Ct. at 2818. The Court also held that the "internal consistency" rule was indeed to be applied in a gross receipts case where the allegation is that a tax on its face discriminates against interstate commerce. *Tyler*, 107 S. Ct. at 2820. The *Tyler* Court concluded the B & O tax exposes out-of-state manufacturing or selling activity to a multiple burden from which only manufacturing in-state and selling in-state are exempt. The Court stated that to the extent its conclusion was inconsistent with its ruling in *General Motors Corp. v. Washington*, 377 U.S. 436, 12 L. Ed. 2d 430, 84 S. Ct. 1564 (1964) that case was overruled.

Our unanimous decision in *National Can* indicates we did not read *Armco* as foreshadowing the result in *Tyler*. Taxpayers argue, however, that *Armco*'s reliance on Justice Goldberg's dissent in *General Motors* clearly informed this court that Washington's tax was unconstitutional. The Supreme Court in *Tyler*, discussing its *Armco* decision, said:

> In explaining why the tax was discriminatory on its face, we expressly endorsed the reasoning of Justice Goldberg's dissenting opinion in *General Mo-*

tors Corp. v. *Washington*, 377 U.S., at 459. We explained:

> "The tax provides that two companies selling tangible property at wholesale in West Virginia will be treated differently depending on whether the taxpayer conducts manufacturing in the State or out of it. Thus, if the property was manufactured in the State, no tax on the sale is imposed. If the property was manufactured out of the State and imported for sale, a tax of 0.27% is imposed on the sale price. See *General Motors Corp.* v. *Washington*, 377 U.S. 436, 459 (1964) (Goldberg, J., dissenting) (*similar provision in Washington, 'on its face, discriminated against interstate wholesale sales to Washington purchasers for it exempted the intrastate sales of locally made products while taxing the competing sales of interstate sellers'*); Columbia Steel Co. v. State, 30 Wash. 2d 658, 664, 192 P.2d 976, 979 (1948) (invalidating Washington tax)." 467 U.S., at 642.

(Italics ours.) *Tyler*, 107 S. Ct. at 2816. The italicized material is a description of Washington's pre-1950 statute which exempted intrastate *sales* on locally manufactured goods. Even though the *Armco* Court did quote Justice Goldberg's *General Motors* dissent, the parenthetical material following that citation referred *not* to the B & O tax statute at issue in *Tyler*, but to the tax which this court struck down in 1948 in *Columbia Steel Co. v. State*, 30 Wn.2d 658, 192 P.2d 976 (1948). Tracing the *Tyler* Court's quote back to Justice Goldberg's dissent in *General Motors*, it appeared that Justice Goldberg was discussing Washington's *old* B & O tax in the sentence which the *Armco* Court quoted. *See General Motors*, at 459. This was appropriate in *Armco* inasmuch as the West Virginia statute was similar to Washington's pre-1950 act. The *Armco* Court's reference to

Justice Goldberg's dissent in *General Motors*, without overruling the other cases on which we relied, did not clearly indicate to us the unconstitutionality of Washington's present tax statute. Not until the *Tyler* decision was it clear the Court was agreeing with Justice Goldberg's conclusion regarding Washington's newer B & O tax exemption and that earlier applicable commerce clause cases were being overruled.

Commerce clause challenges to the multiple activities exemption alleging discrimination against interstate commerce have many times been rejected by this court. *See B.F. Goodrich Co. v. State*, 38 Wn.2d 663, 231 P.2d 325, *cert. denied*, 342 U.S. 876 (1951); *Crown Zellerbach Corp. v. State*, 45 Wn.2d 749, 278 P.2d 305 (1954); *General Motors Corp. v. State*, 60 Wn.2d 862, 376 P.2d 843 (1962), *aff'd*, 377 U.S. 436 (1964); *Chicago Bridge & Iron Co. v. Department of Rev.*, 98 Wn.2d 814, 659 P.2d 463, *appeal dismissed*, 464 U.S. 1013 (1983). This court was clear in our *National Can* decision that because the West Virginia and Washington taxes differed significantly, we were relying on the

> long history of the United States Supreme Court's treatment of this state's gross receipts tax as having withstood commerce clause challenges, *see Department of Rev. v. Association of Wash. Stevedoring Cos.*, 435 U.S. 734, 55 L. Ed. 2d 682, 98 S. Ct. 1388 (1978); *Standard Pressed Steel Co. v. Department of Rev.*, 419 U.S. 560, 42 L. Ed. 2d 719, 95 S. Ct. 706 (1975); *General Motors Corp. v. Washington*, 377 U.S. 436, 12 L. Ed. 2d 430, 84 S. Ct. 1564 (1964)...

National Can, at 339-40.

We believe Washington's rationale prior to the United States Supreme Court decision in *National Can* was a reasonable assessment of existing case law. In 1983 we held that Washington's B & O tax was not discriminatory

under the commerce clause. *Chicago Bridge & Iron Co.*, 98 Wn.2d at 832. The United States Supreme Court dismissed the appeal "for want of substantial federal question", *Chicago Bridge & Iron Co. v. Department of Rev.*, 464 U.S. 1013, 78 L. Ed. 2d 718, 104 S. Ct. 542 (1983). This court in *National Can* said it understood that dismissal to be a "decision on the merits". *National Can Corp. v. Department of Rev.*, 105 Wn.2d 327, 331, 715 P.2d 128 (1986) (citing *Washington v. Confederated Bands & Tribes of Yakima Indian Nation*, 439 U.S. 463, 476 n.19, 58 L. Ed. 2d 740, 99 S. Ct. 740 (1979)). Since this decision issued only the year before *Armco* and addressed the very question at issue in *National Can*, we believed it to conclude that *Armco* did not clearly foreshadow *Tyler*. This court relied on the difference in the Washington and West Virginia statutes and, more importantly, directly on past Supreme Court precedent to uphold the B & O tax in *National Can*.

Also supporting the view that *Tyler* announced new law is Justice Scalia's dissent, which states that the *Tyler* decision "has no basis in the Constitution, and is not required by our past decisions" and that to apply the internal consistency rule, the "Court is compelled to overrule a rather lengthy list of prior decisions". *Tyler*, 107 S. Ct. at 2824 (Scalia, J., dissenting). The dissent notes that in *Williams v. Vermont*, 472 U.S. 14, 21-22, 86 L. Ed. 2d 11, 105 S. Ct. 2465 (1985), decided the term *after Armco*, the Court failed to apply the internal consistency rule. Justice Scalia wrote:

> The holding of *Armco* thus establishes only that a facially discriminatory taxing scheme that is not internally consistent will not be saved by the claim that in fact no adverse impact on interstate commerce has occurred. To expand that brief discussion into a holding that internal consistency is always required, and thereby to *revolutionize the law of state taxation, is remarkable.*

(Italics ours.) *Tyler*, 107 S. Ct. at 2825 (Scalia, J., dissenting). Justice O'Connor concurred in *Tyler*, but did not read it to impose a requirement that the internal consistency rule be applied absent facial discrimination.

Kalama Chemical, representing in-state manufacturers, argues that as to that group *Tyler* did not enunciate a new principle of law. However, this argument ignores this court's reliance on the concept that selling and manufacturing were believed, until *Tyler*, to be substantially equivalent and therefore compensatory.

Taxpayers argue that a letter from the Department of Revenue to the Governor shows that the Department of Revenue believed just after the *Armco* decision that Washington's multiple activities exemption was unconstitutional. The letter from Donald Burrows, Director of Department of Revenue, to Governor John Spellman dated June 14, 1984, expresses the belief that the State faced substantial loss of tax revenue as a result of the *Armco* decision, and also expressed the likelihood of refunds. This argument is directed to the issue of whether the State justifiably relied on past federal and Washington cases to continue to act under the existing Washington statute.

Such a memorandum discussing an agency director's opinion of law is, of course, not binding on this court. Even had this opinion been stated in an official agency statutory construction or written in an attorney general opinion, it would not be binding on either the State or this court. *Walthew, Warner, Keefe, Arron, Costello & Thompson v. Department of Rev.*, 103 Wn.2d 183, 186, 691 P.2d 559 (1984); *Prante v. Kent Sch. Dist. 415*, 27 Wn. App. 375, 385, 618 P.2d 521 (1980). "The court is the proper body to determine the construction and interpretation of statutes. Thus, even when the court's interpretation is contrary to that of an agency charged with carrying out the law, it is ultimately for the courts to declare the law and the effect of the statute." *Nu-*

cleonics Alliance, Local 1-369 v. WPPSS, 101 Wn.2d 24, 29, 677 P.2d 108 (1984).

Even if the director's opinion was that *Armco* placed in question the constitutionality of the B & O tax, it was not within his power to stop collecting taxes under a statute which had been properly enacted by the Legislature. The Department of Revenue was collecting taxes under a statute that had been repeatedly upheld and also enjoyed the presumption of constitutionality. The party challenging the statute would have to prove its invalidity beyond a reasonable doubt. *High Tide Seafoods v. State*, 106 Wn.2d 695, 725 P.2d 411 (1986). The State is not estopped from arguing for prospective application of *Tyler* because it continued to collect taxes under a statute upheld by the trial court and this court because the *Armco* decision raised questions of constitutionality. A similar argument was discussed by the Supreme Court in *Lemon v. Kurtzman*, 411 U.S. 192, 36 L. Ed. 2d 151, 93 S. Ct. 1463 (1973). In *Lemon* state officials continued to act under a statute when they knew that it was obvious there would be a constitutional attack on the statute. The Supreme Court held that state officials are entitled to rely on a presumptively valid state statute, enacted in good faith and not plainly unlawful, and that until judges say otherwise, state officers have the power to carry forward the directives of the state legislature. *Lemon*, at 208-09.

The Department of Revenue may well have relied on the decisions of this court upholding the multiple activities exemption against commerce clause challenges, and there was nothing in the Supreme Court's decisions which clearly overruled this court's analysis until *Tyler* was decided last year. In *St. Francis College v. Al-Khazraji*, —— U.S. ——, 95 L. Ed. 2d 582, 107 S. Ct. 2022 (1987), the Court applied its decision prospectively because it had required a Court of Appeals to overrule its prior cases. *St. Francis*, 95 L. Ed. 2d at 589. As Justice

Traynor has pointed out, "[r]eliance plays its heaviest role in such areas as property, contracts, and taxation, where lawyers advise clients extensively in their planning on the basis of existing precedents." Traynor, *Quo Vadis, Prospective Overruling: A Question of Judicial Responsibility*, 28 Hastings L.J. 533, 543 (1977).

B

COMMERCE CLAUSE PURPOSE

Since we conclude that *Tyler* did establish a new principle of law, we must look to see if the purpose of the commerce clause will be furthered or retarded by retroactive application.

The central purpose of the commerce clause is to create an area of free trade among states. *American Trucking Ass'ns v. Scheiner*, —— U.S. ——, 97 L. Ed. 2d 226, 107 S. Ct. 2829 (1987). However, the Court was clear in *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274, 288, 51 L. Ed. 2d 326, 97 S. Ct. 1076 (1977) that interstate commerce may be made to pay its fair share of tax burdens. "After years of development of Commerce Clause jurisprudence, the Court has concluded that interstate friction will not chafe when commerce pays for the governmental services it enjoys." *Department of Rev. v. Association of Wash. Stevedoring Cos.*, 435 U.S. 734, 760, 55 L. Ed. 2d 682, 98 S. Ct. 1388 (1978).

It is difficult to understand how retroactive application would encourage free trade among the states since whatever chill was imposed on interstate trade is in the past and the Legislature has enacted law to attempt to comport with the new commerce clause taxation laws announced in *Tyler*. Laws of 1985, ch. 190; Laws of 1987, 2d Ex. Sess., ch. 3. The Supreme Court has noted that a state has "a significant interest in exacting from interstate commerce its fair share of the cost of state government." *Department of Rev. v. Association of Wash.*

Stevedoring Cos., supra at 748. If this court afforded retroactive application and ordered full refunds, taxpayers engaged in interstate commerce would pay no portion of their share of the tax burden. The multiple activities exemption is now known to be unconstitutional because it imposes the risk of multiple burdens on interstate commerce, but this is not to say that all taxes imposed on a manufacturer or wholesaler under the B & O tax were unfair or interfered with free trade among states. The very *risk* of multiple burdens is now enough (since *Tyler*) to invalidate the Washington exemption. But, forcing the State to collect no taxes for the entire period of the statute of limitations would be more in the nature of a punitive award for misconstruing the constitutionality of the B & O tax.

Dicta in *Tyler* suggested that the State could continue to tax under the B & O statute if the Legislature expanded the multiple activities exemption to provide out-of-state manufacturers with a credit for manufacturing taxes paid to other states. *Tyler*, 107 S. Ct. at 2821. The Washington Legislature has now enacted two credits whereby out-of-state manufacturers are afforded credits against Washington's selling tax for manufacturing tax paid to another state, and a credit whereby out-of-state sellers are afforded a credit against Washington's manufacturing tax for selling tax paid to another state. Laws of 1985, ch. 190; Laws of 1987, 2d Ex. Sess., ch. 3. Taxpayers now tell this court that most of the litigants would receive no credits or only very minimal credits under this legislation. This appears to be an admission that the *risk* of multiple burdens possible under the Washington B & O tax was not in fact an actual double burden for most of these litigants. The effect of complete retroactive application with refunds of all taxes paid would be to create a window of tax-free time for taxpayers involved in interstate commerce to the detriment of all other taxpayers.

Therefore, since the purpose of the commerce clause of free trade among the states is not enhanced by retroactive application and the effect of retroactive application would be to relieve some interstate taxpayers of their duty to pay their fair share of the tax burden, we must ask whether retroactivity would be inequitable.

INEQUITY IMPOSED BY RETROACTIVE APPLICATION

Taxpayers argue that denying refunds to litigants would discourage challenges to existing precedent. The taxpayers argue *Tyler* should be applied to them because they bore the burden of litigating the issue. They are essentially arguing for what is termed "quasi-prospective" application wherein the new rule applies retroactively to the parties to the overruling decision. Note, *Confusion in Federal Courts: Application of the Chevron Test in Retroactive-Prospective Decisions*, 1985 U. Ill. L. Rev. 117. If courts give successful litigants the benefit of the new rule, they have greater incentive to challenge existing rules. However, this singles out the successful litigant for special treatment while applying the old law to other people similarly situated. It also punishes other parties who relied on prior law and then lose in the overruling decision. 1985 U. Ill. L. Rev. at 128. In addition, in tax cases taxpayers always have the incentive to challenge potentially unconstitutional tax statutes to avoid future tax liability.

Taxpayer Tyler Pipe argues that, because the State argued against an injunction for the collection of taxes pending resolution of the constitutionality of the B & O tax, it now has an absolute right to a refund under the Washington refund statutes. This court denied the requested injunction not only because a remedy at law existed but also because Tyler Pipe failed to make the requisite showing of a likelihood of success on the merits. *Tyler Pipe Indus., Inc. v. Department of Rev.*, 96 Wn.2d

785, 794, 638 P.2d 1213 (1982). The fact that the State argued that taxpayers had an adequate remedy at law in the form of a possible refund should not mean the State is foreclosed from arguing that such a refund is not (under applicable preexisting law) now owed to the taxpayers. Because under Washington law a refund suit constitutes an adequate legal remedy foreclosing a preliminary injunction, it does not mean a successful taxpayer necessarily is entitled to retroactive application of his case. Taxpayers here were on notice that Washington and many other states afford prospective application to decisions finding tax statutes unconstitutional. *Ashland Oil, Inc. v. Rose*, —— W. Va. ——, 350 S.E.2d 531 (1986), *appeal dismissed*, 95 L. Ed. 2d 522 (1987); *Metropolitan Life Ins. Co. v. Commissioner of Dep't of Ins.*, 373 N.W. 2d 399 (N.D. 1985); *Bond v. Burrows*, 103 Wn.2d 153, 690 P.2d 1168 (1984); *Salorio v. Glaser*, 93 N.J. 447, 461 A.2d 1100, *cert. denied*, 464 U.S. 993 (1983); *Jacobs v. Lexington-Fayette Urban Cy. Gov't*, 560 S.W.2d 10 (Ky. 1977); *Pellnat v. Buffalo*, 59 A.D.2d 1038, 399 N.Y.S.2d 788 (1977); *Gulesian v. Dade Cy. Sch. Bd.*, 281 So. 2d 325 (Fla. 1973); *Hurd v. Buffalo*, 41 A.D.2d 402. 343 N.Y.S.2d 950 (1973); *Southern Pac. Co. v. Cochise Cy.*, 92 Ariz. 395, 377 P.2d 770 (1963). *But see Perkins v. County of Albemarle*, 214 Va. 416, 200 S.E.2d 566 (1973). Whether the taxes had been collected or still remained to be collected is not relevant to the issue of retroactive application. The *Ashland* court explained that it was irrelevant whether the disputed taxes had been paid or were simply assessed. *Ashland Oil, Inc. v. Rose*, *supra*. Both taxes collected and those assessed and unpaid fall within the prospective application of *Armco* and could be retained or collected by the State.

As the previous list of citations illustrates, many states including Washington have found it equitable to afford only prospective application to decisions invalidating taxing statutes. In *Bond v. Burrows*, *supra*, this court in-

validated the statutory scheme establishing a sales tax differential for border counties. After determining the tax statute violated the constitutional rule of proportionality, this court unanimously agreed to give the ruling only prospective application. Implicit in *Bond* is the fact that the court did not apply its decision so as to afford any refunds of past taxes to the counties which had paid higher taxes than the border counties.

Last year in *Ashland Oil, Inc. v. Rose, supra,* the West Virginia Supreme Court ruled that *Armco* would be applied prospectively. The West Virginia court determined that the reliance of the state on a presumptively valid tax outweighs injuries sustained on account of a holding of prospectivity.

The State's reliance on the constitutionality of the B & O tax was justifiable in light of decisions such as *Tyler Pipe Indus., Inc. v. Department of Rev., supra*; *National Can Corp. v. Department of Rev.*, 105 Wn.2d 327, 715 P.2d 128 (1986); *Chicago Bridge & Iron Co. v. Department of Rev.*, 98 Wn.2d 814, 659 P.2d 463, *appeal dismissed*, 464 U.S. 1013 (1983); *Department of Rev. v. Association of Wash. Stevedoring Cos.*, 435 U.S. 734, 55 L. Ed. 2d 682, 98 S. Ct. 1388 (1978); and *General Motors Corp. v. Washington*, 377 U.S. 436, 12 L. Ed. 2d 430, 84 S. Ct. 1564 (1964). We do not believe the *Armco* decision so clearly foreshadowed the outcome in *Tyler* that the State's reliance on the validity of the tax was unjustified or that prospective application would be inequitable. As the court in *Salorio* noted, the expenditures made from this revenue during the many years for which refunds are sought cannot be undone, and reimbursement at this point would pose a significant hardship upon the State's existing financial requirements. *Salorio*, 93 N.J. at 465. Refunds sought in these cases alone exceed $56 million and the State estimates refunds from 1980 through 1984 could be in excess of $423 million. Given that the reliance was justified by the presumptive validity of the tax statute

and case law upholding that statute, retroactive application would be inequitable.

We turn now to taxpayers' argument that prospective application would violate due process and equal protection. Prospective application, designed to protect justifiable reliance on prior law and to respect the desire for stability in past transactions, was upheld by the Supreme Court against a due process challenge in 1932 in *Great Northern Ry. v. Sunburst Oil & Ref. Co.*, 287 U.S. 358, 77 L. Ed. 360, 53 S. Ct. 145, 85 A.L.R. 254 (1932). *United States v. Johnson*, 457 U.S. 537, 73 L. Ed. 2d 202, 102 S. Ct. 2579 (1982) reiterated the *Sunburst* rule that the federal constitution has no voice upon the subject of retroactivity and that the constitution neither prohibits nor requires retrospective effect be given to any new constitutional rule. (*Griffith v. Kentucky*, —— U.S. ——, 93 L. Ed. 2d 649, 107 S. Ct. 708 (1987), made some changes in the *Johnson* rationale in criminal settings, but reaffirmed that *Chevron Oil Co. v. Huson*, 404 U.S. 97, 30 L. Ed. 2d 296, 92 S. Ct. 349 (1971) is to be used in civil cases.) Implicit in *Bond v. Burrows*, *supra*, is this court's opinion that retroactive application of a decision invalidating a tax is not constitutionally mandated.

In *Salorio v. Glaser*, *supra*, the New Jersey Supreme Court gave pure prospective effect to a decision declaring a tax statute unconstitutional and ruled that the plaintiffs were not entitled to reimbursement of taxes paid. That court held that "[t]he modern view is that invalidation of a statute does not automatically invalidate all prior transactions made in justifiable reliance upon the statute." *Salorio*, 93 N.J. at 463. Both the *Salorio* court and the *Ashland* court rely on *Lemon v. Kurtzman*, 411 U.S. 192, 36 L. Ed. 2d 151, 93 S. Ct. 1463 (1973) (*Lemon* II) wherein the Court refused to give retroactive application to its decision declaring a Pennsylvania statute unconstitutional. In *Lemon v. Kurtzman*, 403 U.S. 602, 29 L. Ed. 2d 745, 91 S. Ct. 2105 (1971) (*Lemon* I) the

Court held unconstitutional a statute under which the state had reimbursed private sectarian schools for certain educational services. However, in *Lemon* II the Court permitted the state to pay the schools for services provided before its decision. The *Lemon* Court explained, " 'in the last few decades, we have recognized the doctrine of nonretroactivity outside the criminal area many times, in both constitutional and nonconstitutional cases.' " *Lemon* II, at 197 (quoting *Chevron Oil Co. v. Huson, supra* at 106). The Court explained that its holdings in recent years have emphasized that the effect of a given constitutional ruling on prior conduct " 'is subject to no set "principle of absolute retroactive invalidity" . . .' ". *Lemon* II, at 198-99 (quoting *Linkletter v. Walker*, 381 U.S. 618, 627, 14 L. Ed. 2d 601, 85 S. Ct. 1731 (1965)). *Lemon* II also recognized that "statutory or even judge-made rules of law are hard facts on which people must rely in making decisions and in shaping their conduct. This fact of legal life underpins our modern decisions recognizing a doctrine of nonretroactivity." *Lemon* II, at 199.

The *Ashland* court recognized that

> [a]lthough *Lemon II* is not a tax refund case and does not therefore provide direct and conclusive authority in this case, it provides the basis for applying the retroactivity analysis in the context of protecting state fiscal interests. *See also Cipriano v. Houma*, 395 U.S. 701, 89 S. Ct. 1897, 23 L. Ed. 2d 647 (1969) (decision holding unconstitutional Louisiana's property-taxpayer limitation on franchise applied prospectively because retroactivity would impose significant hardship on cities, bondholders, etc.)

Ashland Oil, Inc., 350 S.E.2d at 536. In *Arizona Governing Comm. v. Norris*, 463 U.S. 1073, 77 L. Ed. 2d 1236, 103 S. Ct. 3492 (1983), the majority of the Supreme Court agreed that retroactive relief was not appropriate upon its finding that a state's pension plan violated

U.S.C. Title VII. This court has also recognized that "courts possess the power to give their decisions prospective effect, *i.e.*, not to apply the decision to the parties in the overruling case." *Cascade Sec. Bank v. Butler*, 88 Wn.2d 777, 785, 567 P.2d 631 (1977).

Taxpayers argue that denial of refunds violates equal protection in creating two classes of taxpayers—those whose refund claim is based on the discrimination of the B & O tax against interstate commerce and all others. However, they cite no relevant authority. The body of state and federal law previously cited in the tax area indicates this argument to be without merit. This court held that equal protection forbids all invidious discrimination but does not require identical treatment for all without recognition of difference in relevant circumstances. *Aetna Life Ins. Co. v. Washington Life & Disab. Ins. Guar. Ass'n*, 83 Wn.2d 523, 520 P.2d 162 (1974). In a recent tax case the Supreme Court stated: "In the equal protection context . . . if the State's purpose is found to be legitimate, the state law stands as long as the burden it imposes is found to be rationally related to that purpose, a relationship that is not difficult to establish." *Metropolitan Life Ins. Co. v. Ward*, 470 U.S. 869, 881 84 L. Ed. 2d 751, 105 S. Ct. 1676 (1985). Earlier this year this court held that equal protection challenges to state tax laws are (absent fundamental rights or suspect classifications) reviewed with a minimum level of scrutiny. *Cosro, Inc. v. Liquor Control Bd.*, 107 Wn.2d 754, 733 P.2d 539 (1987). A holding of pure prospectivity would divide taxpayers into two classes in regard to the time of the *Tyler* decision. Given the State's reliance on prior law, this is not a classification without a rational basis.

Having weighed the equities in this case, we conclude that pure prospective application from the date of the United States Supreme Court *Tyler* decision is appropriate, and appellants' claims for refunds before June 23, 1987, are denied.

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

Nos. 51910-2 & 51110-1
Thurston County No. 842019007 and 812007314

NATIONAL CAN CORPORATION,
KALAMA CHEMICAL INC., and
XEROX CORPORATION,
Appellants,

v.

STATE OF WASHINGTON, DEPARTMENT OF REVENUE,
Respondent.

TYLER PIPE INDUSTRIES, INC., a Delaware corporation,
Appellant,

v.

STATE OF WASHINGTON, DEPARTMENT OF REVENUE,
Respondent.

MANDATE

The State of Washington to: The Superior Court of the State of Washington in and for Thurston County

This is to certify that the opinion of the Supreme Court of the State of Washington filed on January 28, 1988, became the decision terminating review of this court in the above entitled case on February 17, 1988. This cause is mandated to the superior court from which the appeal was taken for further proceedings in accordance with the attached true copy of the opinion.

Pursuant to Rule of Appellate Procedure 14.3, costs are taxed as follows: No cost bills having been timely filed, costs are deemed waived.

[SEAL]

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the seal of said Court at Olympia, this 18th day of February, A.D. 1988

/s/ Reginald N. Shriver
REGINALD N. SHRIVER
Clerk of the Supreme Court
State of Washington

cc: Mr. Franklin Dinces, Mr. John Piper
Mr. Donald Young, Mr. James Lowe
& Mr. James Johnston
Mr. Thomas McKinnon
Mr. Thomas Sterken
Hon. Ken Eikenberry
Attorney General
Mr. James Tuttle, Asst.
Mr. William Collins
Reporter of Decisions

APPENDIX B

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

No. 51910-2

NATIONAL CAN CORPORATION *et al.*,
Appellants,

v.

STATE OF WASHINGTON
DEPARTMENT OF REVENUE,
Respondent.

NOTICE OF APPEAL

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES:

Notice is hereby given that National Can Corporation; Advanced Technology Laboratories, Inc.; A.H. Robins Company, Incorporated; Alaskan Copper Companies, Inc.; Alaska Pacific Seafoods, Inc.; Allis-Chalmers Corporation; Alpac Corporation; American Cyamid Company; AMF Head Sportswear, Inc.; AMF, Incorporated; AMF Voit, Inc.; Armstrong World Industries, Inc.; ASC Pacific, Inc.; Basic American Foods, Inc. aka AMPCO Foods, Inc.; Ben Hogan Company; Bethlehem Steel Corporation; Charles of the Ritz Group, Ltd., and its operating subsidiaries; Chrysler Corporation; Clark Equipment Company; Cominco American, Incorporated; Cominco Electronic Materials, Incorporated; Cummins Engine Company, Inc.; Data I/O Corporation; Edward Weck and Company, Inc.; E.R. Squibb & Sons, Inc.; Fentron Building Products Co., a division of Criton Technologies; The

Firestone Tire and Rubber Co.; Ford Motor Company; Foseco, Inc.; General Brewing Company; General Electric Company; G. Heileman Brewing Company, Inc.; Heath Tecna Aerospace Co., a division of Criton Technologies; Honeywell Inc.; International Paper Company; Jacqueline Cochran, Inc.; Kalama Chemical, Inc., Kal Kan Foods, Inc.; Kenai Salmon Packing Company; Korry Electronics Co., a division of Criton Technologies; Lone Star Industries, Inc.; Longview Fibre Company; Mars, Inc.; E.M. Matson, Jr., Co.; Mattel, Inc.; Miller Brewing Company; Murray Pacific Corporation; National Can Corporation; Noel Canning Corporation; North Pacific Processors, Inc.; Peter Pan Seafoods, Inc.; Olympia Brewing Company; Pabst Brewing Company; Paragon Electric Co., Inc.; Quinton Instrument Company; R.A. Hanson Company, Inc.; RAHCO, Inc.; Rainier Brewing Co.; Reynolds Metals Corporation; Scott Paper Company; Shulton, Inc.; Spacelabs, Inc.; Square D Company; Thomasville Furniture Industries, Inc.; Trident Seafoods Corporation; Uncle Ben's, Inc.; U.S. Oil & Refining Co.; Welch Foods, Inc., a cooperative; Western Steel Casting Company; Westinghouse Electric Corporation; W.R. Grace & Co.; Xerox Corporation; appellants herein, hereby appeal to the Supreme Court of the United States from the final order of the Supreme Court of the State of Washington, entered herein on January 28, 1988 denying appellant's claims for refunds.

This appeal is taken pursuant to 28 U.S.C. § 1257(2).

DATED this 26th day of February, 1988.

BOGLE & GATES

/s/ D. Michael Young
D. MICHAEL YOUNG

AFFIDAVIT OF SERVICE

STATE OF WASHINGTON)
)
COUNTY OF KING)

I hereby affirm and certify that service of the foregoing Notice of Appeal to the Supreme Court of the United States was made on the only party required to be served, by mailing true copies thereof to Respondent's attorneys, Kenneth O. Eikenberry, Attorney General, addressed to him at his office, Temple of Justice, Olympia, Washington 98504; and William B. Collins, Assistant Attorney General, addressed to him at his office, 415 General Administration Building, AX-02, Olympia, WA 98504, in the regular United States mail, postage prepaid, this 26th day of February, 1988.

/s/ D. Michael Young
D. MICHAEL YOUNG
Attorney for Appellant

SUBSCRIBED AND SWORN TO before me this 26th day of February, 1988.

/s/ Shirley A. Doyle
Notary Public for the State of
Washington residing at Bellevue

APPENDIX C

CONSTITUTIONAL AND STATUTORY PROVISIONS

United States Constitution, Article I:

> Section 8. The Congress shall have Power . . .;
>
> To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes; . . .
>
> * * * *

United States Constitution, Article III:

> Section 1. The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish. . . .
>
> Section 2. The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;—to all Cases affecting Ambassadors, other public Ministers and Consuls;—to all Cases of admiralty and maritime Jurisdiction;—to Controversies to which the United States shall be a Party;—to Controversies between two or more States;—between a State and Citizens of another State;—between citizens of different states,—between citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.
>
> * * * *

United States Constitution, Article VI:

> * * * *
>
> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under

the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

* * * *

Revised Code of Washington (1987):

§ 82.04.4286 In computing tax there may be deducted from the measure of tax amounts derived from business which the state is prohibited from taxing under the Constitution of this state or the Constitution or laws of the United States.

* * * *

§ 82.32.060 If, upon receipt of an application by a taxpayer for a refund . . . it is determined by the department that . . . a tax has been paid in excess of that properly due, the excess amount paid within such period shall be credited to the taxpayer's account or shall be refunded to the taxpayer, at his option. . . .

* * * *

Any judgment for which a recovery is granted by any court of competent jurisdiction, not appealed from, for tax, penalties, and interest which were paid by the taxpayer, and costs, in a suit by any taxpayer shall be paid in like manner, ...

§ 82.32.150 All taxes, penalties, and interest shall be paid in full before any action may be instituted in any court to contest all or any part of such taxes, penalties, or interest. No restraining order or injunction shall be granted or issued by any court or judge to restrain or enjoin the collection of any tax or penalty or any part thereof, except upon the ground that the assessment thereof was in violation of the Constitution of the United States or that of the state.

* * * *

§ 82.32.180 Any person . . . having paid any tax as required and feeling aggrieved by the amount of the tax may appeal to the superior court of Thurston county, within the time limitation for a refund provided in chapter 82.32 RCW. . . .

The trial in the superior court on appeal shall be de novo . . . . The burden shall rest upon the taxpayer to prove that the tax as paid by him is incorrect, either in whole or in part, and to establish the correct amount of the tax. In such proceeding the taxpayer shall be deemed the plaintiff, and the state, the defendant; . . . . Either party shall be allowed to appeal to the supreme court or the court of appeals in the same manner as other civil actions are appealed to those courts.

It shall not be necessary for the taxpayer to protest against the payment of any tax or to make any demand to have the same refunded or to petition the director for a hearing in order to appeal to the superior court, but no court action or proceeding of any kind shall be maintained by the taxpayer to recover any tax paid, or any part thereof, except as herein provided.

• • • •

APPENDIX D

PARTIES TO THE PROCEEDING

APPELLANTS:

Advanced Technology Laboratories, Inc.
A.H. Robins Company, Incorporated
Alaskan Copper Companies, Inc.
Alaska Pacific Seafoods, Inc.
Allis-Chalmers Corporation
Alpac Corporation
American Cyanamid Company
AMF Head Sportswear, Inc.
AMF, Incorporated
AMF Voit, Inc.
Armstrong World Industries, Inc.
ASC Pacific, Inc.
Basic American Foods, Inc. aka AMPCO Foods, Inc.
Ben Hogan Company
Bethlehem Steel Corporation
Charles of the Ritz Group, Ltd. and its operating subsidiaries
Chrysler Corporation
Clark Equipment Company
Cominco American, Incorporated
Cominco Electronic Materials, Incorporated
Cummins Engine Company, Inc.
Data I/O Corporation
Edward Weck and Company, Inc.
E.R. Squibb & Sons, Inc.
Fentron Building Products Co., a division of Criton Technologies
The Firestone Tire and Rubber Co.
Ford Motor Company
Foseco, Inc.
General Brewing Company
General Electric Company
G. Heileman Brewing Company, Inc.

Heath Tecna Aerospace Co., a division of Criton Technologies
Honeywell Inc.
International Paper Company
Jacqueline Cochran, Inc.
Kalama Chemical, Inc.
Kal Kan Foods, Inc.
Kenai Salmon Packing Company
Korry Electronics Co., a division of Criton Technologies
Lone Star Industries, Inc.
Longview Fibre Company
Mars, Inc.
E.M. Matson, Jr., Co.
Mattel, Inc.
Miller Brewing Company
Murray Pacific Corporation
National Can Corporation
Noel Canning Corporation
North Pacific Processors, Inc.
Peter Pan Seafoods, Inc.
Olympia Brewing Company
Pabst Brewing Company
Paragon Electric Co., Inc.
Quinton Instrument Company
R.A. Hanson Company, Inc.
RAHCO, Inc.
Rainier Brewing Co.
Reynolds Metals Company
Scott Paper Company
Shulton, Inc.
Spacelabs, Inc.
Square D Company
Thomasville Furniture Industries, Inc.
Trident Seafoods Corporation
Uncle Ben's, Inc.
U.S. Oil & Refining Co.
Welch Foods, Inc., a cooperative

Western Steel Casting Company
Westinghouse Electric Corporation
W.R. Grace & Co.
Xerox Corporation

APPELLEE:

State of Washington, Department of Revenue

APPENDIX E

DESIGNATION OF CORPORATE RELATIONSHIPS

Appellants state that this is its original Designation of Corporate Relationships, listing appellants' parents, subsidiaries and affiliates, except for wholly-owned subsidiaries.

APPELLANT:	Advanced Technology Laboratories, Inc.
PARENT:	Squibb Corporation
SUBSIDIARY:	International Biomedics, Inc.
AFFILIATES:	Bach Mueller Company California Public Screening Inc. Charles of the Ritz S.A. Manufactureros Quimicos Farmaceuticos S.A. Ohmaco S.A. Sino American Shanghai Standard Pharmaceuticals Ltd. Squibb Nova Ltd. Squibb Connaught Squibb Industria Quimica, S.A. Squibb Pakistan Ltd. Squibb (Nigeria) Ltd. Squibb of Bangladesh Ltd. Symbotics Ltd. Von Heyden Gesellschaft Mit Beschrankter Haftung
APPELLANT:	A.H. Robins Company, Incorporated
PARENTS:	Stock of A. H. Robins Company, Inc. is publicly traded on the New York Stock Exchange. Corpora-

	tions owning 5% or more of Appellant are:
	Central Fidelity Bank Republic Bank Corporation
SUBSIDIARY:	Lee Laboratories, Inc.
AFFILIATES:	Eurand Italia S.p.A. Eurand International S.r.L. Eurand Microencapsulation, S.A. Pharia Industrial Company A.H. Robins Farmaceutica, S.A. Parfuns Caron, S.A. Plastique et Parfum, S.A. A.H. Robins Showa Co., Ltd.
APPELLANT:	Alaskan Copper Companies, Inc.
PARENT:	None
SUBSIDIARY:	Leschi Boat Service
AFFILIATES:	None
APPELLANT:	Alaska Pacific Seafoods, Inc.
PARENTS:	North Pacific Processors, Inc. owned by Marubeni Corporation, a Japanese corporation (Marubeni-Japan)
SUBSIDIARIES:	None
AFFILIATE:	Kenai Salmon Packing Co.
APPELLANT:	Allis-Chalmers Corporation
PARENTS:	Allis-Chalmers Corporation stock is publicly traded on the New York Stock Exchange. Corporations who own 5% or more of Appellant's stock:
	United Banks of Colorado Equitable Life Assurance Society

BEA Associates
Pension Benefit Guaranty Corporation

SUBSIDIARIES: Orissa Sponge Iron Limited
AC Furesa Andina S.A.
AC Iberia, S.A.
AFNE-Allis S.A.

AFFILIATES: Svenska Fluidcarbon AB
AAF Heat Recovery Limited

APPELLANT: Alpac Corporation

PARENT: Skinner Corporation

Alpac Corporation has no subsidiaries or affiliates.

APPELLANT: American Cyanamid Company

PARENTS: American Cyanamid Company stock is publicly traded on the New York Stock Exchange. No corporation owns 5% or more of Appellant's stock.

SUBSIDIARIES: Cyanamid Iberia, S.A.
Cyanamid India, Ltd.
Cyanamid Italia S.p.A.
Cyanamid Fothergill Ltd.
CYRO Industries
B. Braun-Dexon G.m.b.H.
Cyanamid Taiwan Corp.
TDF Tiofine B.V.
Mitsui-Cyanamid Ltd.
Lederle (Japan) Ltd.
Societe Des Sutures Chirurgicales Robert & Carriere-Lederle

AFFILIATES: None

APPELLANT: AMF Head Sportswear, Inc.

PARENTS: Minstar, Inc. The following are the only corporations owning 5% or more, or beneficial interests in groups owning 5% or more, of Minstar, Inc.:

Jacobs Industries, Inc.
MNR Holdings, Inc.
Leucadia National Corporation
LNC Investments, Inc.
Charter National Life
Insurance Company
American Investment Company
Leucadia, Inc.
Uintah National Corporation
TLC Associates
The Bellfonte Company
Pentad, Inc.

SUBSIDIARIES: None

AFFILIATES: Pioneer Corp.
Enron Corporation
Tidewater, Inc.

APPELLANT: AMF, Incorporated

PARENTS: Minstar, Inc. The following are the only corporations owning 5% or more, or beneficial interests in groups owning 5% or more, of Minstar, Inc.:

Jacobs Industries, Inc.
MNR Holdings, Inc.
Leucadia National Corporation
LNC Investments, Inc.
Charter National Life
Insurance Company
American Investment Company
Leucadia, Inc.
Uintah National Corporation

	TLC Associates The Bellfonte Company Pentad, Inc.
SUBSIDIARIES:	None
AFFILIATES:	Pioneer Corp. Enron Corporation Tidewater, Inc.
APPELLANT:	AMF Voit, Inc.
PARENTS:	Minstar, Inc. The following are the only corporations owning 5% or more, or beneficial interests in groups owning 5% or more, of Minstar, Inc.:
	Jacobs, Industries, Inc. MNR Holdings, Inc. Leucadia National Corporation LNC Investments, Inc. Charter National Life Insurance Company American Investment Company Leucadia, Inc. Uintah National Corporation TLC Associates The Bellfonte Company Pentad, Inc.
SUBSIDIARIES:	None
AFFILIATES:	Pioneer Corp. Enron Corporation Tidewater, Inc.
APPELLANT:	Armstrong World Industries, Inc.
PARENTS:	Armstrong World Industries, Inc. stock is traded on the New York, Philadelphia, and Pacific Stock Exchanges. No corporation owns 5% or more of Appellant.

SUBSIDIARIES:	Armstrong Cork Espana, S.A. Armstrong World Industries Pty. Ltd.
AFFILIATES:	Inarco Limited Armstrong Cork (Ireland) Limited Armstrong World Industries, G.m.b.H.
APPELLANT:	ASC Pacific, Inc.
PARENTS:	BHP Holdings (USA) Inc. (Wholly owned by Broken Hill Proprietary Company, Ltd., an Australian corporation.)
SUBSIDIARIES:	None
AFFILIATES:	Mineracao Wares Utah Carriers Marcona Conveyor Corporation Waipipi Iron Sands BHP Minerals Hunter Valley Aluminum COCE IDM Rheem Pt. Rheem Indonesia Rheem NZ Amalgamated Superannuation Fund Rydalmere Nominees Lypaght (Taiwan) John Lysaght (Malaysia) John Lysaght (PNG) RMI Holdings John Lysaght (South Pacific) Societe Industrielle Clinton International Corporation Associate Airlines

APPELLANT:	Basic American Foods, Inc. aka AMPCO Foods, Inc.

Basic American Foods, Inc. is a privately held corporation. No corporation owns 5% or more of Appellant's stock, and Appellant has no subsidiaries or affiliates.

APPELLANT:	Ben Hogan Company
PARENTS:	Minstar, Inc. The following are the only corporations owning 5% or more, or beneficial interests in groups owning 5% or more, of Minstar, Inc.:
	Jacobs Industries, Inc. MNR Holdings, Inc. Leucadia National Corporation LNC Investments, Inc. Charter National Life Insurance Company American Investment Company Leucadia, Inc. Uintah National Corporation TLC Associates The Bellfonte Company Pentad, Inc.
SUBSIDIARIES:	None
AFFILIATES:	Pioneer Corp. Enron Corporation Tidewater, Inc.
APPELLANT:	Bethlehem Steel Corporation
PARENTS:	Bethlehem Steel Corporation stock is publicly traded on the New York Stock Exchange. The only corporation owning 5% or more of Appellant is United Banks of Colorado, Inc.

SUBSIDIARIES:	Consep Membranes, Inc. Iron Ore Land Company Presque Isle Corporation Seadrill, Inc. Nubeth Joint Venture
AFFILIATES:	Bethlehem Singapore Private Limited Empreendimentos Brasileiros de Mineracao S.A. - E.B.M. Mineracoes Brasileiras Reunidas-MBR G&A Limited Partnership III-A Griffin-Alexander International, Inc. Iron Ore Company of Canada Northern Land Company, Limited La Compagnie de Telephone Ungava Schefferville Power Company Twin Falls Power Corporation Limited Labrador Telephone Co. Restauradora de las Minas de Catorce, S.A. de C.V. Thailand Offshore Joint Venture Walbridge Coatings, an Illinois Partnership Rig V Limited Partnership Nordex Joint Venture Rig VI Limited Partnership Hibbing Taconite Company, a joint venture Ontario Iron Company
APPELLANT:	Charles of the Ritz, Ltd. and its operating subsidiaries

PARENT:	Squibb Corporation
SUBSIDIARY:	Charles of the Ritz S.A.
AFFILIATES:	Bach Mueller Company California Public Screening Inc. International Biomedics, Inc. Manufactureros Quimicos Farmaceuticos S.A. Ohmaco S.A. Sino American Shanghai Standard Pharmaceuticals Ltd. Squibb Nova Ltd. Squibb Connaught Squibb Industria Quimica, S.A. Squibb Pakistan Ltd. Squibb (Nigeria) Ltd. Squibb of Bangladesh Ltd. Symbotics Ltd. Von Heyden Gesellschaft Mit Beschrankter Haftung
APPELLANT:	Chrysler Corporation
PARENTS:	No corporate shareholder owns 5% or more of Appellant's stock. Chrsyler Corporation stock is traded on the New York Stock Exchange.
SUBSIDIARIES:	(Other than dealer corporations) Diamond Star Motors Corporation Mitsubishi Motors Corporation Officine Alfieri Maserati, S.p.A.
AFFILIATES:	None
APPELLANT:	Clark Equipment Company
PARENTS:	Clark Equipment Company stock is publicly traded on the New

York Stock Exchange. The only entities owning 5% or more of Appellant are:

Clark Equipment Company
Leveraged Employee Stock
Ownership Plan
United Banks of Colorado, Inc.
United Bank of Denver
Dean LeBaron Trustee for
Batterymach Financial
Management

SUBSIDIARIES: None

AFFILIATES: VME Group, N.V.
Transmisiones y Equipos
Mecanicos S.A. de C.V.

APPELLANT: Cominco American, Incorporated

PARENT: Cominco Holdings N.V.

Cominco American, Incorporated has no subsidiaries or affiliates.

APPELLANT: Cominco Electronic Materials,
Incorporated

PARENTS: Cominco American, Incorporated
Cominco Holdings N.V.

Cominco Electronic Materials, Incorporated has no subsidiaries or affiliates.

APPELLANT: Cummins Engine Company, Inc.

PARENTS: Cummins Engine Company stock is publicly traded on the New York Stock Exchange.

SUBSIDIARIES: CADEC Systems, Inc.
Consolidated Diesel Company
Cummins Nordeste, S.A.

Cummins Southwest, Inc.
Dampers Iberica S.A.
Dina Cummins, S.A.
Energy Technologies, Inc.
Hyperbar USA, INC.
Kirloskar-Cummins Limited
Onan Corporation
Adept Technologies, Inc.

AFFILIATES: Williams Equine Products, Inc.

APPELLANT: Data I/O Corporation

PARENTS: Data I/O Corporation's stock is publicly traded over the counter in the National Market System. The only entities owning 5% or more of Appellant's stock are:

Bruce E. Gladstone
The Independent Investment Company, Ltd.

Data I/O Corporation has no subsidiaries or affiliates.

APPELLANT: Edward Weck and Company, Inc.

PARENT: Squibb Corporation

SUBSIDIARY: Bach Mueller Company

AFFILIATES: California Public Screening Inc.
Charles of the Ritz S.A.
International Biomedics, Inc.
Manufactureros Quimicos Farmaceuticos S.A.
Ohmaco S.A.
Sino American Shanghai Standard Pharmaceuticals Ltd.
Squibb Nova Ltd.
Squibb Connaught
Squibb Industria Quimica, S.A.

	Squibb Pakistan Ltd. Squibb (Nigeria) Ltd. Squibb of Bangladesh Ltd. Symbotics Ltd. Von Heyden Gesellschaft Mit Beschrankter Haftung
APPELLANT:	E.R. Squibb & Sons, Inc.
PARENT:	Squibb Corporation
SUBSIDIARIES:	None
AFFILIATES:	Bach Mueller Company California Public Screening Inc. International Biomedics, Inc. Manufactureros Quimicos Farmaceuticos S.A. Ohmaco S.A. Sino American Shanghai Standard Pharmaceuticals Ltd. Squibb Nova Ltd. Squibb Connaught Squibb Industria Quimica, S.A. Squibb Pakistan Ltd. Squibb (Nigeria) Ltd. Squibb of Bangladesh Ltd. Symbotics Ltd. Von Heyden Gesellschaft Mit Beschrankter Haftung
APPELLANT:	Fentron Building Products Co., a division of Criton Technologies
PARENTS:	Criton Technologies, a New York partnership Criton Corporation Royal Zenith Inc. The Dyson Kissner Moran Corporation

B.S.D. Diversified Co., Inc.
The Bowery Savings Bank

Fentron Building Products Co. has no subsidiaries or affiliates.

APPELLANT:	The Firestone Tire & Rubber Company
PARENTS:	Stock of The Firestone Tire & Rubber Company is publicly traded on the New York, Midwest & Pacific Stock Exchanges. Corporations owning 5% or more of the Appellant are:
	Banc One Corporation Dean LeBaron d/b/a Batterymach Financial Management United Banks of Colorado, Inc.

The subsidiaries of The Firestone Tire & Rubber Company other than Firestone are:

	Industria Firestone de Costa Rica, S.A. Firestone Italia S.p.A. Liberian Metal Processing, Inc. Firestone N.Z., Limited Firestone Portuguesa S.A.R.L. Firestone El Centenario, S.A. Firestone Tire & Rubber Company of the Philippines Firestone South Africa Limited Firestone Hispania, S.A. Siam Company Limited Adela Investment Company
AFFILIATES:	Companhia Brasileira de Borracha CBB Vulcopneu

Centre Auto Aubagne La Martelle S.A.R.L.
Sentrachem Limited
Hopewell International Insurance Ltd.
United Insurance Company
Lone Star Transport Lines, Inc.
Liberian Bank For Development & Investment

APPELLANT: Ford Motor Company

PARENTS: Ford Motor Company stock is publicly traded on the New York Stock Exchange. No corporate shareholder owns 5% or more of Appellant's stock.

SUBSIDIARIES: The subsidiaries of Ford Motor Company (other than wholly owned subsidiaries or corporations in which all the stock not held by Ford Motor Company is held by dealer-operators of Ford products) are:

Ford Motor Company of Canada, Limited
Ford Brasil, S.A.
Ford-Werke, A.G.
Ford Motor Company (Belgium) N.V.
Ford Motor Company A/S
O/Y Ford A/B
Ford Motor Company Aktiebolag
Ford Nederland B.V.
Eleveth Taconite Company
Ford Lio Ho Motor Company Ltd.
Renaissance Partnership

	Fairlane Woods Association (A Partnership) Ceradyne Advanced Products, Inc. First Nationwide Network, Inc.
AFFILIATES:	None
APPELLANT:	Foseco, Inc.
PARENTS:	Foseco Minsep, Inc. (Owned by Foseco Minsep PLC which is traded in Great Britain.)
SUBSIDIARIES:	None
AFFILIATES:	Greaves Foseco Ltd. Unicorn Industries PLC HH Wardle (Metals) Ltd. Foseco SAE Foseco Japan Fosven C.A. Fosroc Tremco Pty Ltd. Nonporite (NSW) Pty Ltd. Nonporite (QLD) Pty Ltd. Nonporite (WA) Pty Ltd. Nonporite (SA) Pty Ltd. Foseco S.A. Promedo-Sifraco SNC Craelius G.m.b.H. Fosbel Inc. Foseco Espanola S.A. Foseco S.A. de C.V. Foseco Hellas S.A. Fosam Ltd. Giesserei Dinest G.m.b.H. Fosroc Construction Chemicals Private Shareholding Co. Ltd. Foseco Argentina S.A. Exotermicos Monclava S.A. Foseco Industrial E Commercial Ltda.

	Fosbel Brasil
	Foseco Minsep UAE Private Ltd.
	The Golden Gate Metallurgical Development Co.
	Celtite Inc.
	Foseco Korea Ltd.
	Foseco Iran SSK
	Fosbel Japan Ltd.
	Fosbel Europe B.V.
	Foseco Portugal Produtos Para Fundicao Lda.
	Foseco Minsep Inc.
	Van Mannekus Universal
	Forbeton Rhone Alps S.A.R.L.
	Forbeton Acquitaine S.A.R.L.
	Indimant Industridiamanten G.m.b.H.
	Toyoda Van Moppes KK
	Abrasives International Ltd.
	North Derbyshire Metal Products Ltd.
	Protecmat S.A.R.L.
	Van Straaten Universal
	Carborundum Universal Ltd.
	Forbeton S.A.
	LM Van Moppes Diamond Tools Ltd.
	Fosroc Chemicals
APPELLANT:	General Brewing Company
PARENTS:	S&P Company (aka Keller Street Development Co.)
SUBSIDIARIES:	None
AFFILIATES:	Pabst Brewing Company
	Falstaff Brewing Corporation
APPELLANT:	General Electric Company
PARENTS:	General Electric Company stock is publicly traded on the New York

Stock Exchange. No corporation owns 5% or more of Appellant.

SUBSIDIARIES:

Reuter-Stokes Canada Limited
Electromat S.A.
Iran Electrical and Mechanical Services Co.
SADELMI-COGEPI Compagnia Generale Progettazioni e Installazioni S.p.A.
Societa Nazionale della Officine de Savigliano S.p.A.
General Electric de Mexico, S.A. de C.V.
Joint Venture with Industrias Unidas, S.A.
American General Electric (Nigeria) Ltd.
Construcciones Industriales de Maquinaria e Ingenieria, S.A.
Sadelmi-Nigeria Ltd.
General Electric Electromedicina, S.A.
Sociedad Iberica de Contrucciones Electricas
General Electrik Turk Anonim Sirketi
Sadelmi Limited
Adobe Canyon Corporation
Springer Mining Company
Osram Argentina Sociedad Anonima Commercial e Industrial
The China Car and Foundry Company Limited (In Liquidation)
CFM International, S.A.
Fabrications Mecaniques de l'Atlantique S.A.

SNEF Electro Mecanique
(S.E.M.)
Elpro International Limited
IGE (India) Limited
Turbomotori Internazionale S.p.A.
C&C International, Ltd.
Drive System Company, Ltd.
Engineering Plastics, Ltd.
Eye Lighting Systems Corporation
GEM Polymers Ltd.
General Electric (U.S.A.)
Industrial Automation, Ltd.
Information Services
International - Dentsu, Ltd.
Japan Nuclear Fuel Company,
Limited
Toshiba Electric Systems Co. Ltd.
Toshiba Silicone Company, Ltd.
Yokogawa Medical Systems, Ltd.
Samsung Medical Systems
Brelec, S.A. de C.V.
Diesel Industrial y Tractica
S.A. de C.V.
Generacion Electrica Nacional
S.A. de C.V.
Medidores Electromecanicos,
S.A. de C.V.
Ultrapol, S.A. de C.V.
Donald Brown & Co. Ltd.
IGE of Nigeria Ltd.
Sadelmi Nigeria Limited
A/S. Medirad
Philippine Electric Corporation
Jamjoom Electrical Distribution
Assemblies Company Ltd.
Svenska Medirad A.B.
Taian Electric Manufacturing
Company

United Asia Electric Company
CBI Nuclear Company
CFM International, Inc.
Cool Water Coal Gasification Program
Coherent General, Inc.
High Voltage Breakers, Inc.
Hydraulic Turbines, Inc.
Industrial Networking, Inc.
Locke Insulators, Inc.
Otisca Industries, Limited
Ringwood Avenue Joint Venture Assoc.
General Electric de Uruguay S.A.
Venezolana de Compresores y Motores S.A.
Asahi Diamond Industrial Company, Limited
Shinano Tokki, K.K.
Toshiba Corporation
General Electric (Kenya) Ltd.
Marquette Electronics, Inc.
Solomon Design Automation Systems
Star Technologies, Inc.
Vicom Systems, Inc.

AFFILIATES:

General Electric - Goninan Limited
General Electric - Ricard Limited
Sade Sul Americana de Engenharia S.A.
CAMCO, Inc.
Canadian General Electric Company Limited
Constructors-Sadelmi International Ltd.
Condisa S.A. Ingenieros Contratistas

Sud Americana de Electrificacion S.A.
W.Q.S. France S.A.R.L.
Quarzglas G.m.b.H.
Westdeutsche Quarzschmelze G.m.b.H.
Intersil India Limited
Intersil Singapore (Pte.) Limited
Watt & Akkermans Pte. Ltd.
Sociedad Anonima de Ingerieros Contratistas
Bates Turner, Inc.
Sud Americana de Electrificacion S.A.
Bunbury Rewinds Pty. Ltd.
F. R. Tulk & Co. Pty. Limited (In liquidation)
Goldfields Rewinds Pty. Limited
Niart International, Inc.
Valmet-Dominion, Inc.
Consorcio Distral-SADE Ltda. (In liquidation)
EASY, S.A. de C.V.
Enseres Electrodomesticos, S.A. de C.V.
Enseres Electroindustriales, SS. de C.V.
ISLO, S.A. de C.V.
POWER ELECTRICA, S.A. de C.V.
TRAGESA, S.A. de C.V.
Kvaerner-Calma A/S
Philippine Applicance Corporation
Philippine Glass Bulbs, Inc
Pinagkaisa Realty Corporation
Philacor Realty and Development Corporation

Saudi American General Electric Company Limited
TUSAS Motor Sanayii A.S.
Reinsurance Systems Limited
A.P.-GERECCO Ltd.
Airport Tech Center Associates
American Oil and Gas Corporation
Amwest Associates
Arvada-Fremont Developers
Atrium V Joint Venture
BMW Credit Corporation
Baconsfield Associates
Bayou Cogeneration Plant
Bayou Partners Limited
Brandemere Associates
Cardinal Cogen
Center Stage I Associates
CFC/GECC (New York) Associates I
CFC/GECC (New York) Associates II
Diamond Oaks Associates
Ebbert's Homes VI
Ebbert's Homes VII
Equipment Financing Associates
Executive Center West Associates
FGIC Corporation
Financo Investors Fund L.P.
Financo Investors Management Partnership L.P.
Gleneagle Associates
Guinness Peat Aviatim
Huntington Glen Associates
Kirby Fletcher Stamford, Ltd.
Kramer Capital Corporation
Lonestar Florida Holding, Inc.
Marquette Center Associates I

Millicent Way Associates
Mira Mesa R&D Associates
Northchase One Associates
Northchase Two Associates
Northern Oaks Associates
Northern Telecom/General Electric Credit Associates
Ozona Development Drilling Partnership I
Ozona Development Drilling Partnership II
Ozona Development Drilling Partnership III
Park Place Developers, Ltd.
Pathfinder Mines Corporation
Patrick Petroleum Corporation Drilling Program No. 1
Patrick Petroleum Corporation South Louisiana Five Well Investment Package
Pear Tree Joint Venture
Pellicano Business Center Associates
Pierremont Phase II Associates
Plum Tree Dallas Associates, Ltd.
Powers Pointe Associates
Regency Park
Renner Plaza Associates
Racom Corporation
Rolling Hills Ranch
Structural Dynamics Research Corporation
SGE (New York) Associates I
SGE (New York) Associates II
Summit Oakes Associates
Timberglen Associates
VHD Electronics, Inc.
Vandenberg Country Club

Wainoco Appalachian
Stamford, Ltd.
Watkins Equity Leasing
Wiles Associates
Woodlands Corporate Ctr. II
Manufacturera de Aparatos
Domesticos S.A.
Turbinas y Mecanica C.A.
Vidriolux, C.A.
SADE Sociedad Anonima
Constructora, Commercial,
Industrial, Financiera,
Inmobiliaria y de Mandatos
Jones and Rickard (Pty.) Limited
Banco Brasileiro de Investimentos
Ipiranga S.A. (In liquidation)
UMON-Engenharia de
Montagem Ltda.
Canadian Nuclear Equipment
Suppliers Limited
TUSAS Aerospace Sanayii A.S.
Industrias Electronicas S.A.
Sociedad Financiera Credival C.A.
APA Ventures II Limited
Anadigics, Inc.
Analogic Corporation
Applied ImmuneSciences, Inc.
Applied Information Memories
Applied Materials, Inc.
Arlington Cable Partners
Avanti Communications Corp.
Axiom Computers, Inc.
Biological Energy Corp.
Brooke & Mack, Inc.
CGX Corp.
Cadre Technologies, Inc.
Canaan Computer Corp.
Commterm, Inc.

Computer Aided Design Group, Inc.
Computer Thought Corp.
Corporate Traffic Management, Inc.
Crop Genetics International N.V.
Crosspoint Venture Partners II
EnMasse Computer Corp.
Fairfield Venture Capital Fund L.P.
Galileo Electro-Optics Corp.
Gigabit Logic, Inc.
Health Stop Medical Management, Inc.
Hercules Limited Partnership Interest
Hercules Offshore Drilling Co.
I-Scan Corp
Ibis Systems, Inc.
Kleiner, Perkins, Caufield & Byers II
Kleiner, Perkins, Caufield & Byers II Annex
Koala Technologies Corp.
Kurta Corp.
Laserpath Corp.
Masstor Systems Corp.
Medical and Scientific Designs, Inc.
Megatape Corp.
Mobile Satellite Communications Corp.
Morris Decision Systems, Inc.
Multiflow Computer, Inc.
Nellcor, Inc.
Netra Corp.
Octel Communications Corp.
Omni-Flow, Inc.

Perceptron, Inc.
Prime Capital L.P.
Raster Technologies, Inc.
Saber Technology Corp.
Scientific Computer Systems, Inc.
SEEQ Technologies, Inc.
Silicon Compilers, Inc.
Stratus Computer, Inc.
Sydis, Inc.
Symbolics, Inc.
TeleSoft, Inc.
UTI Instruments Co.
Vitalink Communications Corp.
Ztel, Inc.
Burndy Corp.
Hughes Tool Co.
Cedar Creek Associates
RCA/Sharp Microelectronics, Inc.
Page America Group, Inc.
Philippine Global Communications, Inc.
Center for Advanced Television Studies
Earth Observation Satellite Co.
Lodgistix Inc.
Microelectronics and Computer Technology Corp.
Planar Systems, Inc.
Semiconductor Research Center
Hearst/ABC-RCTV
RCA/Columbia Pictures Home Video
Screen Sport, LTD.
RCA/Ariola Europe, Ltd.
RCA/Ariola International (Australia)
RCA/Ariola International (Brazil)

Record Service Benelux N.V.
RCA/Ariola International (Canada)
Ariola/RCA Musik G.m.b.H.
Arbos Musicverlag Hans Gerig K.G.
Dean Records Musicproductions- und-Verlagsgesell G.m.b.H.
MSC Music Center Trontragervertrebs G.m.b.H.
Edizioni Musicale Acqua Azzura S.r.L.
Resolute Casa Editorice Musicale S.r.L.
RVC Corp.
RCA/Ariola International S. de R.l. de C.
Record Service Benelux B.V.
RCA S.A. (Spain)
RCA/Ariola Limited (U.K.)
RCA/Columbia Pictures International Video
Gaumont-Columbia Films RCA Video
Vertriebsgellschaft RCA/Columbia Pictures Video G.m.b.H. & Co., K.G.
RCA Columbia Pictures Video S.p.A.
CIC Video-RCA/Columbia Pictures Video S.R.C.
RCA/Columbia Pictures Video, U.K.
Transradio Chilena Compania de Telecommunicacones S.A.
RCA/Ariola International (New York)

APPELLANT:	G. Heileman Brewing Company, Inc.
PARENTS:	G. Heileman Brewing Company, Inc. stock is publicly traded on the New York Stock Exchange. The only entity owning 5% or more of Appellant is Batterymach Financial Management.

G. Heileman Brewing Company, Inc., has no subsidiaries or affiiliates.

APPELLANT:	Heath Tecna Aerospace Co., a division of Criton Technologies
PARENTS:	Criton Technologies, a New York partnership Criton Corporation Royal Zenith Inc. The Dyson Kissner Moran Corporation B.S.D. Diversified Co., Inc. The Bowery Savings Bank

Heath Tecna Aerospace Co. has no subsidiaries or affiliates. .

APPELLANT:	Honeywell Inc.
PARENTS:	Honeywell Inc. stock is publicly traded on the New York Stock Exchange. No corporation owns 5% or more of Appellant.
SUBSIDIARIES:	Votan Honewell-Ericsson Development Company Honeywell-Sharecom Houston Honeywell AG Honeywell Turki-Arabia LTD.

Goldstar-Honeywell Company, LTD.
NEC Honeywell Space Systems
Honeywell B.V.

AFFILIATES:

Magnetic Peripherals Inc.
Societe De Promotion Commerciale Bull S.A.R.L.
Peripheral Components Inc.
Optical Peripherals Lab
Data Management S.p.A.
RSO Futura S.r.L.
Societa Iniziative Commerciali Industriali Techniche S.p.A. Sicit
Sviluppo Informatica Sistemi Aziendali S.p.A. Sisa
Societa Italiana Servizi Technici Ed Organizzativi S.p.A. Sisto
Hong Leong Honeywell Sdn. Bhd.
Honeywell Sistemas Informacion, S.A. DE C.V.
Mexicanna Industrial Honeywell, S.A. DE C.V.
IPC-ISSC-Automation G.m.b.H. and Co., KG
Compagnie CII-HB Internationale N.V.
Honeywell Bull, S.A. (Belgium)
ABC-BULL Telemacatic S.A.
CII Honeywell Bull Systems N.V.
Honeywell Bull A.G.
Sociedade Portuguesa Honeywell, Bull, LDA.
Honeywell Bull, S.A. (Spain)
Datasystem, S.A.
Honeywell Do Brasil & Cia.

Saudi Arabian Tetra Tech Limited
CDA-Weeks, A joint venture
Pyromeca S.A.
Cometa S.A.
Honeywell ET Compagnie
Honeywell Europe S.A. Holding K.G.
Honeywell India Limited
Yamatake-Honeywell Co., LTD.
Taishin Co., LTD.
Yamatake Engineering Service Co., Ltd.
IPC Espana, S.A.
Yamatake and Co., Ltd.
Honeywell Kuwait K.S.C.
Dienes-Honeywell G.m.b.H.
FEG Gesellschaft Fur Logistik
Arbeitsmedizinische Betreuungsgesellschaft Kieler Betriebe G.m.b.H.
Centra-Buerkle G.m.b.H.
Bull S.A.
CII Honeywell Bull Congo
OY Honeywell Bull AB
Bull CP8
CII Honewell Bull Afrique, S.A.
CII Honeywell Bull Cameroun S.A.R.L.
CII Honeywell Bull Gabon S.A.R.L.
CII Honeywell Bull Cote D'Ivoire S.A.
CII Honeywell Bull Niger S.A.R.L.
CII Honewell Bull Senegal S.A.R.L.

	Compagnie Francaise D'Investissments Prives (COFIP)
	Societe Internationale Pour L'Innovation
	CII Honeywell Bull Systems
	Bull Peripherals G.m.b.H.
	Honeywell Bull S.A.L.
	Honeywell Bull, Madagascar
	Honeywell Bull Maroc S.A.
	Mirco Card Technologies Inc.
APPELLANT:	International Paper Company
PARENTS:	International Paper Company stock is publicly traded on the New York Exchange. No corporation owns 5% or more of Appellant.
SUBSIDIARIES:	Arizona Chemical Company
	International Paper Capital Formation, Inc.
	Societe Mediterraneenne, D'Emballages
	Corporacion Forestal De Venezeula, C.A.
	Envases Internacional, S.A.
	Forest Insurance Limited
	International Paper Korea Ltd.
	IPI Corporation
	Paper Industries Corporation of the Philippines
	Productora De Papeces, S.A.
	Rouviere Company
	Sicilcartone, S.r.L.
AFFILIATES:	None
APPELLANT:	Jacqueline Cochran, Inc.
PARENTS:	American Cyamaid Company

Jacqueline Cochran, Inc. has no subsidiaries or affiliates.

APPELLANT:	Kalama Chemical, Inc.
PARENTS:	Kalama Chemical, Inc. is a privvately held corporation. The only corporations owning any stock in Kalama are:
	The Dow Chemical Company, Norwest Growth Fund, Inc., Shriner's Hospital, and The British Columbia Sugar Refining Company, Ltd.
	Other than their passive ownership interests, none of these corporations are affiliated with Kalama.
SUBSIDIARIES:	Kalama Foreign Sales Corporation Kalama International, Ltd.
AFFILIATES:	Seville Trading Co. Ltd. Kalama International, a joint venture Chatterton, Inc.

APPELLANT:	Kal Kan Foods, Inc.
PARENT:	Mars, Incorporated

Kal Kan Foods, Inc. has no subsidiaries or affiliates.

APPELLANT:	Kenai Salmon Packing Co.
PARENT:	North Pacific Processors, Inc. owned by Marubeni Corporation, a Japanese corporation (Marubeni-Japan).
SUBSIDIARIES:	None
AFFILIATES:	Alaska Pacific Seafoods

APPELLANT:	Korry Electronics Co., a division of Criton Technologies

PARENTS:	Criton Technologies, a New York partnership
	Criton Corporation
	Royal Zenith Inc.
	The Dyson Kissner Moran Corporation
	B.S.D. Diversified Co., Inc.
	The Bowery Savings Bank

Criton Technologies has no subsidiaries or affiliates.

APPELLANT:	Lone Star Industries, Inc.
PARENTS:	Lone Star Industries, Inc. stock is publicly traded on the New York Stock Exchange.
SUBSIDIARIES:	Arm-Star Venture Associates
	Compania Nacional de Cemento Portland
	Dixon-Marquette Cement, Inc.
	General Hydrocarbons Polymer Concrete Inc.
	Lone Star-Falcon
	Lone Star-KC Concrete Tie Company
	Lone Star Prestress Concrete, Inc.
	Northwest Aggregates Co.
	Pacific Coast Cement Corporation
	Polycon Research, Inc.
	Polymer Concrete Research, Inc.
	Pyrament N.V.
	Quazite Corporation
AFFILIATES:	Angaston Holdings Ltd.
	Campania de Cimento Salvador S.A.
	Canteras de Riachuelo S.A.
	Cemento San Martin S.A.
	Hawaiian Cement

Hawaii Pier 32 Holding Corporation
Lonestar Florida Cement, Inc.
Lonestar Florida Holding, Inc.
Lone Star Hawaii, Inc.
Lone Star Hawaii Cement Corporation
Lone Star Hawaii Rock Products, Inc.
Lone Star Hawaii Services, Inc.
Plastibeton Canada Inc.
Plastibeton Inc.
Riachuelo S.A.
Stresscon, partnership
San-Vel Santa Fe J/V
CACP Cementus S.A.
Lone Star Hawaii Construction, Inc.
Lone Star Hawaii Properties, Inc.
Cimento Maua S.A.
Marcomin Participacoes Ltda.
Qualimat Distribuidoes de Materiais de Construcao S.A.
Minsisiso Campeao Ltda.
Campeao Participacoes Ltda.
Maporte Transportadoes Ltda.
Cimentos Aluminosos Cialmig-Lafarge Ltda.

APPELLANT:	Longview Fibre Company
PARENTS:	Longview Fibre Company is a privately held corporation. No corporation owns 5% or more of Appellant's stock and Appellant has no subsidiaries or affiliates.
APPELLANT:	Mars, Inc.
PARENTS:	Mars, Inc. is a privately held corporation, and Appellant has no subsidiaries or affiliates.

APPELLANT:	E. M. Matson, Jr., Co.
PARENTS:	E. M. Matson, Jr., Co is a sole proprietorship. Appellant has no subsidiaries or affiliates.
APPELLANT:	Mattel, Inc.
PARENTS:	Stock of Mattel, Inc. is publicly traded on the New York Stock Exchange. Corporations owning 5% or more of Appellant are: Warburg, Pincus Capital Partners, L.P. E.M. Warburg Pincus & Co., Inc. RJR, Ltd. WDR, Ltd. Camont Investments, Inc.
SUBSIDIARIES:	Mattel Molds, Ltd. (Taiwan) Ma-ba Corporation (Japan)
AFFILIATES:	None
APPELLANT:	Miller Brewing Company
PARENTS:	Philip Morris Companies, Inc. Philip Morris Inc.

Miller Brewing Company has no subsidiaries or affiliates.

APPELLANT:	Murray Pacific Corporation
PARENTS:	Murray Pacific Corporation is a privately held corporation. No corporation owns 5% or more of Appellant and Appellant has no subsidiaries or affiliates.
APPELLANT:	National Can Corporation
PARENT:	Triangle Industries, Inc.
SUBSIDIARIES	None

AFFILIATES:	Central Jersey Industries Avery, Inc. Nippon National Seikon Co. National Can Italiana, S.p.A. Nacanco SUD S.p.A. National Can Iberica, S.A.
APPELLANT:	The Noel Corporation d/b/a Noel Canning Corporation
PARENTS:	Noel Canning Corporation is a privately held corporation. No corporation owns 5% or more of Appellant's stock, and Appellant has no subsidiaries or affiliates.
APPELLANT:	North Pacific Processors, Inc.
PARENT:	Marubeni Corporation, a Japanese corporation (Marubeni-Japan)
SUBSIDIARIES:	Alaska Pacific Seafoods, Inc. Kenai Salmon Packing Co.
AFFILIATES:	None
APPELLANT:	Peter Pan Seafoods, Inc.
PARENT:	Nichiro Gyogyo Kaisha, Ltd.
SUBSIDIARIES:	Peninsula Salmon, Inc. Peter Pan Communications, Inc. SeaBlends Food Company, Inc. Seven Seas Fishing Company, Inc. Astoria Warehousing, Inc.
AFFILIATES:	Nichiro Pacific, Ltd.
APPELLANT:	Olympia Brewing Company
PARENTS:	Pabst Brewing Company is successor in interest as of 12/31/83. Pabst is owned by S&P Company.

SUBSIDIARIES:	None
AFFILIATES:	Falstaff Corporation General Brewing Company
APPELLANT:	Pabst Brewing Company
PARENT:	S&P Company (aka Keller Street Development Co.)
SUBSIDIARIES:	None
AFFILIATES:	Falstaff Corporation General Brewing Company
APPELLANT:	Paragon Electric Co., Inc.
PARENTS:	Paragon Electric Co., Inc. is a privately held corporation. No corporation owns 5% or more of Appellant. Paragon has no subsidiaries or affiliates.
APPELLANT:	Quinton Instrument Company
PARENT:	A.H. Robins Company, Incorporated
SUBSIDIARIES:	None
AFFILIATES:	Lee Laboratories, Inc. Eurand Italia A.P.A. Eurand International S.r.L. Eurand Microencapsulation, S.A. Pharia Industrial Company A.H. Robins Farmaceutica, S.A. Parfums Caron, S.A. Plastique et Farfume, S.A. A.H. Robins Showa Co., Ltd.
APPELLANT:	R.A. Hanson Company, Inc.

PARENTS: R.A. Hanson Company, Inc. is a privately held corporation. No corporation owns 5% or more of Appellant.

R.A. Hanson Company has no subsidiaries or affiliates.

APPELLANT: RAHCO, Inc.

PARENT: R.A. Hanson Company, Inc.

RAHCO, Inc. has no subsidiaries or affiliates.

APPELLANT: Rainier Brewing Co.

PARENT: G. Heileman Brewing Company, Inc.

Rainier Brewing Co. has no subsidiaries or affiliates. Appellant merged into parent 12/31/83.

APPELLANT: Reynolds Metals Company

PARENTS: Reynolds Metals Company stock is publicly traded on the New York Stock Exchange. The only corporations owning 5% or more of Appellant are:

Templeton, Galbraith & Hausberger, Ltd.
Windsor Fund Series/ Windsor Fund
Wellington Management Co./ Thorndyke, Doran, Paine & Lewis

SUBSIDIARIES: Alpart Farms (Jamaica), Ltd.
Alpart Jamaica, Inc.
Alternwerder Hutten-Und Walzwerk G.m.b.H.
Eskimo Pie Corporation

Halco (Mining), Inc.
Volta Aluminium Company Limited

AFFILIATES:

Aluminio Del Caroni, S.A.
Aluminio Reynolds Del Peru Sociedad Anonima
Aluminio Reynolds, S.A.
Aluminio Reynolds, Santo Domingo, S.A.
Aluminium-Oxid-Gemeinschaft Stade
Aluminium Oxid Stade G.m.b.H.
Aluminum Corporation of the Philippines
Bevco Containers
Bushnell Plaza Development Corporation
City Venture Corporation
Compania Metallurgica Colombiana, S.A.
Compagnie Des Bauxites De Guinee
Egyptian Aluminium Products Company
Eskimo Europ, S.a.r.l.
Hamburger, Aluminium-Werk G.m.b.H.
Industria Navarra Del Aluminio, S.A.
Industrias Lacteas Del Yocomia, S.A.
Industrias Metal Mecanicas Del Quindio, S.A.
Iranian Aluminum Co.
Jamaica Alumina Security Company, Ltd.
Lynx-Canada Explorations Limited

Manicouagan Power Company
Minas Do Dragao Ltda.
Mineraco Rio Do Norte S.A.
Mineraco Sao Jorge Ltda.
Mineradora De Bauxita Ltda.
Minerais De Aluminio Ltda.
New Eastwick Corporation
Phillips-C.B.A. Conductors Limited
Presidential Development Corporation
Presidential Plaza Corporation
Puerto De Hierro, Sociedad Anonima
Reynolds Aluminio, Sociedad Anonima
Reynolds Aluminum Company of Canada, Ltd.
Reynolds Philippine Corporation
Reywest Development Corporation
S.L.I.M.-Societa Lavorazioni Industriali Metalli S.p.A.
Superenvases Envalic, C.A.
Umco, S.A.
Union Industrial y Astilleros Barranquilla "Unial" S.A.
Valesul Aluminio S.A.
Weybosset Hill Development Corporation
Worsley Alumina Pty., Ltd.
Alternative Housing Associates
Alumina Partners of Jamaica
Aluminium-Oxid-Gemeinschaft Stade
Bennett Manor Associates
Bevco Containers
Burrstone Associates
Capitol Hill Associates, Ltd.

Cathedral Square Associates
Cathedral Square Associates, II
Chasco Woods Associates, Ltd.
Curtis Apartments Associates
Cypress Courts Associates, Ltd.
Cypress Cove Associates, Ltd.
Drew Gardens Associates, Ltd.
Midtown Associates
Mill Pond Towers Associates
The National Housing Partnership
Oceanside Estates Associates, Ltd.
One Empire Plaza Associates
Rayburn Manor Associates
Regency West Associates
Reynolds Gilbane Realty
Associates
Reywest Development Company
Southeast Vinyl Company
Titusville Manor Associates
Windermere Associates, Ltd.
Eastwick Joint Venture I
Eastwick Joint Venture IV
Mount Gibson Joint Venture
Regency Joint Venture
The Reynolds-Gilbane-
Weybosset Joint Venture
Worsley Joint Venture
Austria Dose G.m.b.H.
Reynolds Aluminum
Holdinggesellschaft m.b.H.
Austria Dosen Gesellschaft m.b.H.
& Co. K.G.
1401 17th Street Associates
Crown Oak Associates of Penfield
Gerro Reynolds Dosenwerk
G.m.b.H. & Co. K.G.
Kimbrook Manor Associates, Ltd.
LaSalle Square Associates
RMC Holdings (Delaware), Inc.

APPELLANT:	Scott Paper Company
PARENTS:	None
SUBSIDIARIES:	None
AFFILIATES:	Gureola-Scott, S.A. Taiwan Scott Paper Corporation Celulosa Jujuy, S.A. Companhia de Papisis Scott Paper Limited Scott Paper Company de Costa Rica Sanyo Scott Company, Limited Ssangyong Paper Co., Ltd. Compania Industrial de San Cristobal Scott Trading Limited Thai-Scott Paper Company Limited Brunswick Pulp & Paper Company Brunswick Pulp Land Company Canso Chemicals Limited Mountain Tree Farm Company

APPELLANT:	Shulton, Inc.
PARENT:	American Cyanamid Company

Shulton, Inc. has no subsidiaries or affiliates.

APPELLANT:	Spacelabs, Inc.
PARENT:	Squibb Corporation
SUBSIDIARIES:	None
AFFILIATES:	Bach Mueller Company California Public Screening Inc. Charles of the Ritz S.A. International Biomedics, Inc.

	Manufactureros Quimicos Farmaceuticos S.A. Ohmaco S.A. Sino American Shanghai Standard Pharmaceuticals Ltd. Squibb Nova Ltd. Squibb Connaught Squibb Industria Quimica, S.A. Squibb Pakistan Ltd. Squibb (Nigeria) Ltd. Squibb of Bangladesh Ltd. Symbotics Ltd. Von Heyden Gesellschaft Mit Beschrankter Haftung
APPELLANT:	Square D Company
PARENT:	Square D Company stock is publicly traded on the New York Stock Exchange. Only one entity owns more than 5% of Appellant: Delaware Management Company, Inc.
SUBSIDIARIES:	Palatine Hills Leasing, Inc. Square D Andina, S.A. Square D (Saudi Arabia) Limited
AFFILIATES:	Furukawa Circuit Foil Co., LTD Square D France, S.A. Square D Company Australia PTY, Limited Square D Italia S.p.A. Daito Topaz
APPELLANT:	Thomasville Furniture Industries, Inc.
PARENT:	Armstrong World Industries, Inc.
SUBSIDIARIES:	None

AFFILIATES:	Inarco Limited Armstrong Cork (Ireland) Limited Armstrong World Industries, G.m.b.H. Armstrong Cork Espana, S.A. Armstrong World Industries Pty. Ltd.
APPELLANT:	Trident Seafoods Corporation
PARENTS:	Trident Seafoods Corporation is a privately held corporation. No corporation owns 5% or more of Appellant.
SUBSIDIARY:	San Juan Seafoods, Inc.
AFFILIATE:	Windjammers, Inc.
APPELLANT:	Uncle Ben's Inc.
PARENT:	Mars, Incorporated

Uncle Ben's, Inc. has no subsidiaries or affiliates.

APPELLANT:	U.S. Oil & Refining Co.
PARENT:	Time Oil Co.
SUBSIDIARY:	Diox Oil Inc.
AFFILIATES:	None
APPELLANT:	Welch Foods, Inc., a cooperative
PARENT:	National Grape Cooperative Association, Inc.
SUBSIDIARIES:	The Springfield Bank for Cooperatives Cooperating Brands, Inc.
AFFILIATES:	None

APPELLANT:	Western Steel Casting Company
PARENTS:	Western Steel Casting Company is a privately held company.

Appellant has no subsidiaries or affiliates.

APPELLANT:	Westinghouse Electric Corporation
PARENTS:	Westinghouse Electric Corporation stock is traded on the New York Stock Exchange. No corporation owns 5% or more of Appellant.
SUBSIDIARIES:	Electric Office Centers of America Innovative Technologies, Inc. KRW Energy Systems, Inc. Mictron, Inc. Powerex, Inc. Sentec Corporation Siliconix, Inc. Speech Plus Theta J Corporation Toshiba-Westinghouse Electronics Corporation Turbine Metal Technologies, Inc. United Western Technologies VLSI Technology WM Power Products, Inc. Compagnie des Dispositifs Semiconducteurs Westinghouse Eletromar Industria Eletrica Brasileira, S.A. Enwesa Servicios S.A. Tyree Industries Limited Vektron, S.A. Westinghouse Canada Inc. Westinghouse, S.A. WEXICO Systems and Services, Ltd.

AFFILIATES:	Boo Instrument AB CDSW Ireland Limited CEMAC Westinghouse PTY Limited Condumex Consu-IEM, S.A. de C.V. Contradores Electricos, C.A. Division Comercial IEM, S.A. de C.V. Electro-Fanal S.A. Eletromar Nordeste, S.A. Electrotableros, S.A. de C.V. E-Mail Westinghouse PTY Ltd. Empresas IEM, S.A. de C. V.
APPELLANT:	W.R. Grace & Co.
PARENTS:	W.R. Grace & Co. stock is publicly traded on the New York Stock Exchange. No corporation owns 5% or more of Appellant.
SUBSIDIARIES:	AWI Business Data Services, Inc. Carbon Dioxide Slurry Systems L.P. CFF Beverage Company Del Taco Corporation Duke Transportation Inc. El Torito Restaurants, Inc. EMAbond Inc. E.T. Beverage Company, Inc. GHL Management, Inc. Grace Ventures Partnership One Herman's Sporting Goods, Inc. J.T. Beverage Inc. The L.C.S. Beverage Company, Inc. Monolith Enterprises, Incorporated

Mountain View Insurance Company
S&H Beverage Co., Inc.
Soft Kat, Inc.
Taco Villa, Inc.
T&D Beverage, Inc.
TAG Pharmaceuticals, Inc.
Producta de Papeles S.A.
Feldmuehle-Grace Noxeram G.m.b.H.
Darex Kabushiki Kaisha
Fuji-Davison Chemical Ltd.
Nippon Belt Kogyo K.K.
Teroson K.K.
Homco Trinidad Ltd.
Trinidad Nitrogen Co., Limited
Bartow Chemical Products

AFFILIATES:

Agracetus
Axial Basin Ranch Company
Beckett Partners
Bison Nitrogen Products Co.
Colowyo Coal Company
Four Corners Mine
Ft. Meade Chemical Products
Grace-Feldmuehle Motor Ceramics Company
Hayden Gulch West Coal Company
H-G Coal Company
Hughes Drilling Fluids
Marine Culture Enterprises
Oklahoma Nitrogen Co.
Paramont Coal Company
Pursue Gas Processing and Petrochemical Company
The Fono Ice Cream Company
Equipos IEM, S.A. de C.V.

Friem, S.A. de C.V.
Funktionelle Musik G.m.b.H.
Futu-IEM, S.A. de C.V.
Galileo La Rioja, S.A.
Galileo Uruguaya, S.A.
Hyundai Elevator
IEM S.A.
Industrias Electronicas, S.A.
Industria IEM, S.A. de C.V.
Industry Services Company of Saudi Arabia, Ltd.
Korea Industry Services Company, Ltd.
Maihak A.G.(H.)
Mex-Control, S.A. de C.V.
Mitsubishi Nuclear Fuel Co., Ltd.
Mitsubishi-Westinghouse Electric SGC, Ltd.
Reftrans, S.A.
Servicos Corporativos, IEM, S.C.
Silectra, S.A. de C.V.
Transformadores de Distribucion, S.A.
Transformadores TPL S.A.
Tyree-Power Construction Limited
Wescan Europe, Ltd.
Westinghouse Asia Controls Corp.
Westinghouse Electric Supply Co. of Saudi Arabia
Westinghouse Electro Metalurgicas, C.A.
Westinghouse Projectos Electricos, S.A.
Westinghouse Saudi Arabia, Ltd.
Westralian Transformers PTY Limited
Avatar Technologies Control

Bridgeport Community Antenna TV Co.
Cable TV General, Inc.
CATV Enterprises, Inc.
American Health Capital HIBI Management, Inc.
Cordell Chemicals, Inc.
El Paso Cablevision, Inc.
Focus Cable of Oakland, Inc.
Grosse Point Cable, Inc.
Group W Cable of Columbia Heights/Hilltop, Inc.
Group W Cable of Lorain County, Inc.
Group W Cable of North Central Chicago, Inc.
Group W of Northwest Chicago, Inc.
Group W Cable of St. Bernard, Inc.
Horizon International Television, Inc.
Integrated Communications Systems
Kaiser-Teleprompter of Hawaii, Inc.
New Trends, Inc.
Northern Tier Pipeline
O'Connor Combustor Corporation
Perceptics
Piedmont Cablevision, Inc.
Porta Pak Corporation
Saw Mill River Cablevision, Inc.
Sifco Turbine Component Services
Southwest Video Corporation
Sutro Towers, Inc.
Telecom Cablevision, Inc.
Television Tower, Inc.
Valid Logic Systems, Inc.

APPELLANT:	Xerox Corporation
PARENTS:	Xerox Corporation stock is publicly traded on the New York Stock Exchange. No corporation owns 5% or more of Appellant.
SUBSIDIARIES:	Xerox Canada Inc. Xerox do Brasil S.A. Xerox del Peru, S.A. Xerox de Venezuela, C.A. Xerox de Colombia S.A. Rank Xerox Investments Limited Rank Xerox Limited Rank Xerox Holding B.V.
AFFILIATES:	Societe Industrielle Rank Xerox S.A. Fuji Xerox Co., Ltd. Rank Xerox (Australia) Pty. Limited Rank Xerox Greece S.A. International Marine Underwriters of New England, Inc. LWB Syndicate Inc. CALPAC Holding Company, Inc. Claremont Holdings Limited Commonwealth County Mutual Insurance Company Commonwealth Lloyd's Insurance Company Financial Guaranty Associates, Inc. Dimensional Corporate Finance, Inc.

APPENDIX F

[SEAL]

STATE OF WASHINGTON

DEPARTMENT OF REVENUE

Olympia, Washington 98504 MS-AX-02

DATE: June 14, 1984

TO: The Honorable John Spellman
Governor

FROM: Donald R. Burrows, Director /s/ DB
Department of Revenue

RE: Potential Tax Loss to the State of Washington Resulting from U.S. Supreme Court Decision on West Virginia Business and Occupation Tax (*Armco, Inc. v. Hardesty*, No. 83-297, decided June 12, 1984)

We are faced with the potential for a substantial loss of tax revenue as a result of a U.S. Supreme Court decision handed down this week involving the Armco Corporation. That company had challenged the application of West Virginia's business and occupation tax to out-of-state manufacturers, selling certain products into the state. I noted this case in my March 1984 activities report. Washington filed an amicus curiae brief with the U.S. Supreme Court in support of West Virginia.

According to our senior attorneys general, we will in all likelihood sooner or later have to refund business and occupation taxes to out-of-state manufacturers. These refunds will cover taxes paid in the current and four prior years. Our attorneys also advise me that in-state manufacturers might have grounds for similar relief from B&O tax based upon the wording of the *Armco* de-

cision. This latter possibility is not so imminent, and there is greater likelihood that those impacts can be mitigated either in the legislature or the courts.

We have for many years taxed out-of-state manufacturers selling into our state provided there has been sufficient local activity. The landmark decisions of the U.S. Supreme Court in *General Motors* (1964) and *Standard Pressed Steel* (1975) uphold that authority.

In the *Armco* decision, the Supreme Court found that West Virginia's statute discriminated against out-of-state manufacturers in violation of the Commerce Clause because it imposed the wholesaling tax on out-of-state manufacturers, while exempting local manufacturers (liable for the manufacturing B&O tax) from the same wholesaling tax. Our own statute (RCW 82.04.440) exempts in-state manufacturers from the B&O tax on manufacturing, if they wholesale their merchandise in Washington, provided these firms pay the B&O tax as wholesalers on their in-state sales.[1] Out-of-state manufacturers are subject to wholesaling B&O tax in this state. Our law provides no credit against that tax for a manufacturing gross receipts tax for which that out-of-state seller might be liable to the state of manufacture. In the opinion of our attorneys the reasoning of the Court in the *Armco* decision is clearly applicable to our statutory arrangement, thus setting up the distinct prospect of a substantial revenue loss. A memorandum from the Department's attorneys analyzing the decision in greater detail is included here.

The potential revenue loss is comprised of (1) refunds of B&O taxes paid between January 1, 1980 and July 1, 1984, (2) future revenue loss for the remainder of this

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[1] Out-of-state sales of Washington manufacturers are constitutionally exempt from wholesaling B&O tax. We can and do tax them on their manufacturing activities.

biennium, and (3) revenue loss for the 85-87 biennium. We are now working intensively to develop a reliable estimate of the revenue loss and this will be forwarded to you as soon as we have it.

The attached memorandum from our counsel discusses possible legislative changes to preserve the B&O tax on out-of-state manufacturers. Two are being given immediate consideration. The safest, legally, for purposes of insuring a continued wholesaling (or retailing) tax on the out-of-state manufacturer would be the more difficult change to enact. The change would remove the exemption from the manufacturers B&O tax for those in-state manufacturers selling within the state. Thus, integrated manufacturers would pay both the manufacturing and wholesaling tax. This doubling-up was in fact the manner in which the business and occupation tax was previously applied to an integrated manufacturer until the manufacturers exemption now found in RCW 82.04.440 was put into place many years ago. We can expect strong opposition from in-state manufacturers to this proposal for legislative change.

The second alternative currently under exploration would provide to the out-of-state manufacturer, selling into Washington, a credit against its obligation for wholesaling or retailing business and occupation tax by reason of a manufacturing business and occupation or similar gross receipts tax paid to another state in which the manufacturing took place. This would result in the loss of some revenue, but there are currently few states which have such manufacturing gross receipts taxes. While a challenge would undoubtedly be made to such an amendment, our attorneys are reasonably confident that the amendment could be sustained.

We are continuing to work on these revenue loss estimates. In the meantime, I or the members of my staff

are available to provide your office with a more detailed briefing.

P.S.

The legal analysis from our AG's and court decision will be sent over this PM

cc: Rolland Schmitten
Ken Gross
Joe Taller
Matthew J. Coyle
Leland T. Johnson

No. 87-1629

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1987

NATIONAL CAN CORPORATION, et al.,

Appellant,

v.

STATE OF WASHINGTON DEPARTMENT OF REVENUE,

Appellee.

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF WASHINGTON

MOTION TO DISMISS OR AFFIRM

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Attorney General
State of Washington

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No. 87-1629

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1987

NATIONAL CAN CORPORATION, et al.,

Appellant,

v.

STATE OF WASHIGTON, DEPARTMENT OF REVENUE,

Appellee.

On Appeal From The Supreme Court Of The State of Washington

MOTION TO DISMISS OR AFFIRM

MOTION TO DISMISS OR AFFIRM

Appellee, State of Washington, Department of Revenue, moves this Court to dismiss the appeal herein or, in the alternative, to affirm the judgment of the Washington State Supreme Court on the ground that the questions presented are so unsubstantial as to require no further argument.[1]

JURISDICTION

National Can Corporation (NCC) is not entitled to appeal the Washington Supreme Court's decision in *Na-*

[1]This action is not subject to review by appeal pursuant to 28 U.S.C. § 1257(2). See Jurisdiction, *infra.*, p. 1. If this action is treated as a petition for writ of certiorari, the State respectfully requests that this Court deny the petition.

tional Can Corporation v. Department of Revenue, 109 Wn.2d 878, 749 P.2d 1286 (1988) pursuant to 28 U.S.C. § 1257(2).[2] In *Tyler Pipe Industries, Inc. v. Washington State Department of Revenue*, 483 U.S. __, 107 S.Ct. 2810 (1987) this Court invalidated Washington's multiple activities exemption, Wash. Rev. Code § 82.04.440. Contrary to NCC's assertion (J.S. 2), on remand the Washington Supreme Court did not sustain the validity of that statute against challenge under the U.S. Constitution, as required by 28 U.S.C. § 1257(2). Instead, the court ruled that *Tyler Pipe* should not be applied retroactively.

The Washington Supreme Court's decision relates "to the appropriate scope of federal equitable remedies, a problem arising from the enforcement of a state statute during the period before it had been declared unconstitutional." *Lemon v. Kurtzman*, 411 U.S. 192, 199 (1973) (*Lemon II*). Thus, NCC is entitled to seek review only pursuant to a petition for writ of certiorari under 28 U.S.C. § 1257(3). NCC's Jurisdictional Statement should be considered as such a petition pursuant to 28 U.S.C. § 2103.

STATEMENT OF THE CASE

In *Tyler Pipe*, 107 S.Ct. 2810, 2823 (1987) this Court held "Washington's multitple activities exemption invalid because it places a tax burden upon manufacturers in Washington engaged in interstate commerce from which local manufacturers selling locally are exempt." This Court remanded the case to the Washington Supreme Court to determine the appropriate remedy.

Tyler Pipe was handed down on June 23, 1987. Less than two months later, on August 10, 1987, the Washington legislature met in special session to respond to the decision. Following this Court's lead, the legislature re-

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[2]Tyler Pipe Industries, Inc. also seeks review of *National Can* by this Court. See *Tyler Pipe Industries, Inc. v. State of Washington Department of Revenue*, U.S. Supreme Court Docket No. 87-1767.

pealed the multiple activities exemption and substituted a new system of credits.[3] Under the new law a Washington manufacturer may take a credit against its Washington manufacturing tax for selling gross receipts taxes paid to another state, local or foreign jurisdiction. Similarly, an out-of-state manufacturer may take a credit against its Washington selling tax for manufacturing gross receipts taxes paid to another state, local or foreign jurisdiction. Laws 1987, 2nd ex. sess., ch. 3. App. A. These credits eliminate any possibility of a multiple burden as a result of duplicate taxes imposed by another jurisdiction.

NCC disagrees with this Court that these credits "presumably cure the discrimination."[4] 107 S.Ct. 2821. In the proceeding before the Washington Supreme Court on remand, NCC submitted an offer of proof to the effect that few jurisdictions have selling or manufacturing gross receipts taxes and that most interstate taxpayers are not subject to such taxes. Brief of Appellant Xerox Corporation on Remand From the Supreme Court of the United States at A-1, *National Can*. This assertion is important in this case because it constitutes an admission that NCC has not been subjected to an actual multitple tax burden as a result of the invalid multiple activities exemption.

On remand the Washington court ruled that this Court's decision in *Tyler Pipe* does not apply retroactive-

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[3]As this Court stated in *Tyler Pipe* "an expansion of the multiple-activities exemption to provide out-of-state manufacturers with a credit for manufacturing taxes paid to other States would presumably cure the discrimination." 107 S.Ct. at 2821. This Court also stated that the "parallel condition precedent for a valid multiple activities exemption * * * would provide a credit against Washington tax liability for wholesale taxes paid by local manufacturers to any State, not just Washington." 107 S.Ct. at 2819-20.

[4]Approximately 80 taxpayers are presently challenging the constitutionality of the newly enacted credits in *American National Can Corporation, et al. v. Department of Revenue, State of Washington, et al.*, Thurston County Cause No. 88-2-00680-3.

ly.[5] The court denied claims for refund before June 23, 1987, the date of this Court's decision in *Tyler Pipe. National Can*, 109 Wn.2d 878, 895 (1988). J.S. 18a. NCC now seeks review of this decision.

SUMMARY OF ARGUMENT

1. NCC asks this Court to accept review of the decision below on two grounds. First, the Washington Supreme Court is said to have distorted and reshaped the factors identified by this Court in *Chevron Oil Co. v. Huson*, 404 U.S. 97 (1971) for determining when a decision of this Court should be given only prospective application. J.S. (i), 6, 10 and 15. Second, and apparently without regard to whether the *Chevron* factors were correctly applied, NCC contends that giving only prospective application to this Court's decision in *Tyler Pipe*, 107 S.Ct. 2810 (1987) would do unprecedented and unacceptable violence to the mandates of Article III § 2 and the Commerce Clause of the U.S. Constitution.[6] J.S.(i), 5-6, 7-9 and 16-17. In this regard, NCC appears to argue that the interests protected by the Commerce Clause mandate that no decision invalidating some feature of a state's taxing statute can ever be given only prospective application, if future discrimination by states is to be avoided.

2. However, the court below correctly adhered to the three *Chevron* factors. The tests themselves and their proper application sufficiently accommodate the Commerce Clause interest of discouraging future discrimina-

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[5]On remand there were three potential questions before the Washington Supreme Court. The first was whether *Tyler Pipe* should be applied retroactively. The second question had to do with the scope of refunds if *Tyler Pipe* was applied retroactively. The credit enacted by the legislature could, by its terms, be applied retroactively. See App. A. The legislature sought to cure past discrimination by supplying the missing credits. The third question was one of severability of the entire multiple activities exemption in the event the new credit should be found invalid. Since the court ruled that *Tyler Pipe* was not retroactive, it did not reach the second or third question.

[6]NCC first discusses the Article III question and then the *Chevron* question. We reverse that order.

tion against interstate business. The Commerce Clause does not peculiarly require that such litigants always be given retrospective relief when the *Chevron* tests for giving a decision only prospective application are otherwise satisfied. The fact that appellants, as the litigants in *Tyler Pipe*, will be given prospective relief only, and not both retroactive and prospective relief, is not unprecedented. The result is consistent with what this Court has done in other cases, and raises no issue of the existence of a case or controversy within the meaning of Article III. This case presents no substantial federal question for this Court's consideration.

3. NCC's argument that the court below has reshaped the *Chevron* factors in an unacceptable manner focuses exclusively on the first *Chevron* factor, that "the decision to be applied nonretroactively must establish a new principle of law." 404 U.S. at 106. This assertion both misconstrues *Chevron* and misrepresents the court's opinion in *National Can*, 109 Wn.2d 878 (1988). The argument misconstrues *Chevron* because this Court held that a new principle of law is established by "overruling clear past precedent on which litigants may have relied * * * *" 404 U.S. at 106. NCC simply ignores this test. The argument misrepresents *National Can* because the Washington Supreme Court focused its analysis primarily on "the long line of cases upholding the Washington B&O tax, [and] the fact that *Tyler* [*Pipe*] overruled past precedent on which the states may have relied * * * *" 109 Wn.2d at 882. Far from reshaping the first factor, the Washington Supreme Court carefully followed the line drawn by this Court in *Chevron*.

The Washington Supreme Court was equally careful in evaluating the second and third *Chevron* factors — purpose and inequity. The free trade purpose of the Commerce Clause would not be retarded by only prospective application of *Tyler Pipe* because whatever chill was imposed on interstate trade is in the past. It would also be inequitable to require the State to make refunds given its

reasonable reliance on past precedent. This case involves substantial sums. Refunds sought by the litigants exceed $56 million and for the period 1980 through 1984 the State estimates refunds in excess of $432 million.

——4. The court's conclusions with regard to the second and third *Chevron* factors are strengthened by the unique circumstances in this case. *Tyler Pipe* invalidated the multiple activities exemption because of the risk of multiple burden, stemming from the fact that the exemption took into account only Washington's taxes, not similar taxes in another jurisdiction. However, NCC contends that few other jurisdictions have similar taxes and that, in general, interstate taxpayers were not subject to an actual multiple burden. Thus, precisely because the discrimination and multiple burdens are more hypothetical than real, it is difficult to imagine that free trade among the states was ever actually chilled in this case.

Similarly, the substantial harm to the State from making massive refunds must be balanced against the fact that NCC suffered virtually no harm. Indeed, any refund to NCC would constitute a pure windfall. For if the multiple activities exemption had taken into account, in the first place, another jurisdiction's similar taxes, NCC would have had to pay without question the taxes for which it now seeks a refund.

5. NCC further argues that there should never be only prospective application in a Commerce Clause case — even if the *Chevron* factors support it. NCC contends that prospective application will simply encourage states to pass discriminatory tax laws and then seek prospective application of adverse decisions. This argument ignores the three *Chevron* factors, particularly the first one. There must be a new principle of law established, and this is a threshold requirement. Washington met this threshold requirement because its tax system remained virtually unchanged since 1950, and the constitutionality of the system was sustained on numerous occasions by both the Washington Supreme Court and this Court. Thus, *Na-*

tional Can provides no incentive for states to discriminate intentionally against interstate commerce.

6. NCC also contends that this Court is without power under Article III to apply its decisions only prospectively to the litigants before it. This contention is contrary to the decisions of this Court. In both *Lemon v. Kurtzman*, 411 U.S. 192 (1973) (*Lemon II*) and *Arizona Governing Committee for Tax Deferred Annuity and Deferred Compensation Plans v. Norris*, 463 U.S. 1073 (1983), this Court refused to apply its decisions rertroactively to the successful litigants before it. However, in both decisions this Court applied its decision prospectively to those litigants. *National Can* is consistent with *Lemon II* and *Norris*. In *National Can* the court refused to apply *Tyler Pipe* retroactively to NCC. However, *Tyler Pipe* does apply prospectively. After *Tyler Pipe* the State had the choice of foregoing future collection of taxes from appellants or amending its laws to conform to this Court's decision.

Article III does not require a taxpayer to receive retroactive relief. This Court has held that it has jurisdiction to hear tax cases under Article III even when the plaintiff is not seeking a tax refund. *Boston Stock Exchange v. State Tax Commission*, 429 U.S. 318, 320 n.3 (1977) and *Nashville, Chattanooga and St. Louis Railway v. Wallace*, 288 U.S. 249, 263-65 (1932).

ARGUMENT

THIS CASE PRESENTS NO SUBSTANTIAL FEDERAL QUESTION AND THE DECISION BELOW IS CORRECT

The decision below is correct and the case does not present important questions of law that must be resolved

by this Court.[7] Reversing the order used by NCC, we begin with the question regarding the *Chevron* factors. We then address the Article III question.

I. THE WASHINGTON SUPREME COURT CORRECTLY APPLIED THE CHEVRON FACTORS IN DECIDING NOT TO APPLY TYLER PIPE RETROACTIVELY.

In *Chevron*, 404 U.S. 97, 106-7 (1971) this Court set out three factors for determining whether the decision in a civil proceeding should be applied prospectively or retroactively. These three factors may be referred to as reliance, purpose and inequity. In *National Can*, 109 Wn.2d 878 (1988) the Washington Supreme Court carefully evaluated each factor in deciding not to apply *Tyler Pipe*, 107 S.Ct. 2810 (1987) retroactively. The decision below is correct.

In addition, whether *Tyler Pipe* should be applied retroactively is not a substantial federal question. NCC tries to breathe significance into the question by charging that the Washington Supreme Court has reshaped the *Chevron* factors. J.S. 6 and 10. This charge is unfounded. NCC's argument simply ignores the substantive analysis of the court in *National Can*. We will demonstrate this point by reviewing, in turn, each of the three *Chevron* factors and the manner in which they were applied below.

A. The Reliance Factor—Tyler Pipe Established a New Principle of Law by Overruling Past Precedent on Which the State Had Justifiably Relied.

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[7] If NCC's Jurisdictional Statement is regarded—as it should be—as a petition for writ of certiorari pursuant to 28 U.S.C. § 2103, the writ should not issue. This case fails to meet the considerations outlined in Rule 17.1 of the Rules of the Supreme Court of the United States. NCC alleges no conflict between the decision below and the decision of any other state or federal court or any decision of this Court. In addition, the Washington Supreme Court did not decide an important question of law which has not been, but should be, settled by this Court.

1. A new principle of law is established when this Court overrules past precedent.

The first factor is reliance. To be applied prospectively only a decision

> must *establish a new principle of law, either by overruling clear past precedent on which litigants may have relied*, see, e.g., *Hanover Shoe v. United Shoe Machinery Corp.*, supra, at 496, or by deciding an issue of first impression whose resolution was not clearly foreshadowed * * * *

Chevron, 404 U.S. at 106 (citations omitted, emphasis added).

NCC argues that a new principle of law must constitute a sharp break from prior precedent. J.S. 12. We agree. However, NCC completely ignores the question of how to tell when a sharp break occurs. *Chevron* and *Hanover Shoe, Inc. v. United Shoe Machinery Corp.*, 392 U.S. 481, 496 (1968), which is cited in *Chevron*, both stand for the proposition that a new principle of law is established when this Court unmistakably overrules clear past precedent. The precedent overruled may be precedent of this Court or of other appellate courts. *Chevron*, 404 U.S. at 107 and *Saint Francis College v. Al-Khazraji*, 481 U.S. ___, 107 S.Ct. 2022, 2025-26 (1987).

2. Prior to Tyler Pipe Washington's tax was repeatedly sustained; and compensating taxes were sustained despite the risk of multiple burdens.

To determine whether a decision of this Court establishes a new principle of law, it is necessary to review the law as it existed prior to the decision. NCC simply ignores the past precedent of this Court, and treats *Tyler Pipe* as a case of first impression, which it certainly is not. Two aspects of the law prior to *Tyler Pipe* are important in this case.

First, prior to *Tyler Pipe* Washington's business and occupation (B&O) tax was repeatedly sustained against

constitutional challenge. The B&O tax at issue in *Tyler Pipe*, including the multiple activities exemption, had remained essentially unchanged since 1950. As this Court noted in *Tyler Pipe*, 107 S.Ct. 2015 n.9, the constitutionality of this system had been challenged on several occasions and had always been sustained; sustained by the Washington Supreme Court and Court of Appeals and sustained by this Court. See *B. F. Goodrich v. State*, 38 Wn.2d 663, 668, 231 P.2d 325 (1951), cert denied 342 U.S. 876 (1951); *Crown Zellerbach Corp. v. State*, 45 Wn.2d 749, 759, 278 P.2d 305 (1954); *General Motors Corp. v. State*, 60 Wn.2d 862, 876, 376 P.2d 843 (1962), aff'd 377 U.S. 436, 449 (1964); *Standard Pressed Steel Co. v. Department of Revenue of Washington*, 10 Wn.App. 45, 52, 516 P.2d 1043 (1973), aff'd 419 U.S. 560, 563 (1975); and *Chicago Bridge & Iron Co. v. Washington Department of Revenue*, 98 Wn.2d 814, 830, 659 P.2d 463 (1983), appeal dismissed for want of a substantial federal question, 464 U.S. 1013 (1983). Thus, until this Court's decision in *Tyler Pipe* Washington's B&O tax was imposed with the full approval of the courts.

Second, prior to *Tyler Pipe* this Court sustained compensating taxes—such as the use tax—despite the possibility of a multiple burden. This Court has long been aware that a compensating tax may result in a multiple burden. The possibility of a multiple burden exists if one state imposes a use tax on goods without allowing a credit for taxes paid, on the same goods, to another state. Without the credit the same goods are potentially subject to both a sales tax and a use tax. In such a case the risk of a multiple burden is obvious.

Despite this possibility, this Court refused to invalidate a use tax, on the grounds of a potential multiple burden, until "a taxpayer paying in the state of origin is compelled to pay again in the state of destination." *Henneford v. Silas Mason Co.*, 300 U.S. 577, 587 (1937); *Southern Pacific Co. v. Gallagher*, 306 U.S. 167, 172 (1939); and *Williams v. Vermont*, 472 U.S. 14, 21-2 (1985).

This Court applied the same rule in sustaining the Washington B&O tax in *General Motors*, 377 U.S. at 448-49 and *Standard Pressed Steel*, 419 U.S. at 563. This Court has consistently required taxpayers subject to compensating taxes to prove they were subject to an actual multiple burden. Until *Tyler Pipe* the mere risk of such burden was not enough.

3. The Washington Supreme Court found that Tyler Pipe had established a new principle of law because this Court had overruled past precedent.

In *National Can*, 109 Wn.2d at 882-88 J.S. 4a-11a the Washington Supreme Court concluded that *Tyler Pipe* had established a new principle of law because this Court had overruled past precedent. The court below placed primary reliance on "the long line of cases upholding the Washington B&O tax, [and] the fact that *Tyler [Pipe]* overruled past precedent on which the states may have relied." 109 Wn.2d at 882. In *Tyler Pipe* this Court overruled its decisions which had sustained compensating taxes despite the risk of multiple burden and its decisions which had sustained the Washington tax system at issue. This Court also overruled decisions of the Washington Supreme Court sustaining this State's tax system.

NCC clearly disregards this Court's decision in *Chevron* on this point. NCC refuses to acknowledge that a new principle of law is established when this Court overrules clear past precedent. NCC argues that the Washington Supreme Court reshaped the first factor into some sort of subjective test. J.S. 6 and 15. This argument distorts the court's analysis. The Washington Supreme Court found a new principle of law had been established because past precedent had been overruled. The best way to demonstrate this is to quote the court directly:

> Commerce Clause challenges to the multiple activities exemption alleging discrimination against interstate commerce have many times been rejected by

this court. See *B. F. Goodrich Co. v. State*, 38 Wn.2d 663, 231 P.2d 325, cert. denied, 342 U.S. 876 (1951); *Crown Zellerbach Corp. v. State*, 45 Wn.2d 749, 278 P.2d 305 (1954); *General Motors Corp. v. State*, 60 Wn.2d 862, 376 P.2d 843 (1962), aff'd 377 U.S. 436 (1964); *Chicago Bridge & Iron Co. v. Department of Rev.*, 98 Wn.2d 814, 659 P.2d 463, appeal dismissed, 464 U.S. 1013 (1983). This court was clear in our *National Can* [105 Wn.2d 318 (1986)] decision that because the West Virginia and Washington taxes differed significantly, we were relying on the

> long history of the United States Supreme Court's treatment of this state's gross receipts tax as having withstood commerce clause challenges, see *Department of Rev. v. Association of Wash. Stevedoring Cos.*, 435 U.S. 734, 55 L.Ed.2d 682, 98 S.Ct. 1388 (1978); *Standard Pressed Steel Co. v. Department of Rev.*, 419 U.S. 560, 42 L.Ed.2d 719, 95 S.Ct. 706 (1975); *General Motors Co. v. Washington*, 377 U.S. 436, 12 L.Ed.2d 430, 84 S.Ct.. 1564 (1964) * * * *National Can*, [105 Wn.2d] at 339-40.

* * *

Also supporting the view that *Tyler* announced new law is Justice Scalia's dissent, which states that the *Tyler* decision "has no basis in the Constitution, and is not required by our past decisions" and that to apply the internal consistency rule, the "Court is compelled to overrule a rather lengthy list of prior decisions." *Tyler*, 107 S.Ct. at 2824 (Scalia, J., dissenting).

109 Wn.2d at 885-86. The words of the Washington Supreme Court refute NCC's claim that the court reshaped the first factor.

Significantly, NCC does not disagree that past precedent has been overruled. NCC's only real argument is that the overruling was not accomplished in *Tyler Pipe*. Thus, NCC's complaint is reduced to a disagreement about when prior precedent was overruled—not about some reshaping of the first factor itself. This complaint does not give rise to a substantial federal question. The Washington Supreme Court is correct—*Tyler Pipe* is the case that overruled past precedent.

4. Tyler Pipe—Not Armco—overruled past precedent in holding the multiple activities exemption invalid because of the risk of multiple burden.

This Court's discussion of the discrimination issue in *Tyler Pipe* is contained in Part III of the opinion. 107 S.Ct. 2816-20. There are two parts to this Court's analysis. First, this Court considered the structure and consequences of the multiple activities exemption. 107 S.Ct. 2816-7. This Court relied on *Armco, Inc. v. Hardesty*, 467 U.S. 638 (1984) to establish that the manufacturing B&O tax was facially discriminatory. Second, this Court considered the State's argument that the manufacturing tax was valid as a compensating tax, despite the apparent facial discrimination. 107 S.Ct. at 2817-20. This Court concluded that the manufacturing B&O tax was not valid as a compensating tax because the multiple activities exemption held the potential for a discriminatory multiple burden. This Court's holding with regard to compensating taxes overrules past precedent. We begin our discussion with that holding.

(a) Tyler Pipe overruled past precedent by holding the multiple activities exemption discriminatory, without proof of an actual multiple burden.

The manufacturing B&O tax appears discriminatory because it is imposed primarily on interstate commerce. However, a tax that appears discriminatory does not discriminate against interstate commerce, if it is a valid compensating tax. The use taxes sustained in *Silas Mason*, 300 U.S. 577 (1937) and *Southern Pacific*, 306 U.S.. 167 (1939) also appeared facially discriminatory because they were imposed solely on goods from out of state.

In *Tyler Pipe* this Court ruled that the manufacturing tax was not valid as a compensating tax because the benefits of the multiple activities exemption did not ex-

tend to another state's taxes. This Court said that the multiple activities exemption eliminates "the risk of multiple taxation when the acts of manufacturing and wholesaling are both carried on within the State. The exemption excludes similarly situated manufacturers and wholesalers which conduct one of those activities within Washington and the other activity outside the State." 107 S.Ct. at 2820. To have a valid multiple activities exemption this Court said it would be necessary for the State to provide "a credit against Washington tax liability for wholesale taxes paid by local manufacturers to any State, not just Washington." 107 S.Ct. 2819-20.

Thus, this Court ruled that the manufacturing tax was not valid as a compensating tax, because of the risk of multiple burden caused by the failure of the multiple activities exemption to take into account the taxes of other states. *Tyler Pipe* rests entirely on the *risk* of multiple burden. NCC never proved or even claimed it was actually subject to a gross receipts tax on manufacturing or selling imposed by another state. Indeed, NCC now claims that it does not pay such taxes because few other jurisidctions impose them. Brief of Appellant Xerox Corporation on Remand From the Supreme Court of the United States at A-1, *National Can*.

Tyler Pipe overruled past precedent in two respects. First, of course, it overruled prior decisions in Washington and of this Court sustaining the very tax system at issue in *Tyler Pipe*. See Section I(A)(2), *supra*., p. 9-10. The majority specifically overruled *General Motors*, 377 U.S. 436 (1964) to the extent it was inconsistent. 107 S.Ct. at 2820. Second, *Tyler Pipe* overruled this Court's prior decisions sustaining compensating taxes, despite the risk of multiple burden caused by the failure to allow a credit for taxes paid to another state. 107 S.Ct. at 2824 (Scalia, J., dissenting). See Section I(A)(2), *supra*., p. 10.

(b) In Tyler Pipe this Court invoked Armco merely as a prelude to its discussion of the compensating tax issue.

NCC argues that *Tyler Pipe* did not overrule past precedent owing to this Court's reliance on *Armco*. J.S. 13-14. In fact, this Court invoked *Armco* only to set the stage for its discussion of the compensating tax issue. This Court began by noting that the multiple activities exemption "has the same facially discriminatory consequences as the West Virginia exemption * * * invalidated in *Armco*." 107 S.Ct. at 2816. This Court went on to say that its reliance in *Armco* on Justice Goldberg's dissent in *General Motors*, 377 U.S. 459-60 dooms the State's effort to distinguish "between an exemption from a wholesaling tax — as was present in *Armco* — and the exemption from a manufacturing tax" in *Tyler Piper*. 107 S.Ct. at 2817. Thus, the taxes in both Washington and West Virginia appeared facially discriminatory. Washington's manufacturing tax would therefore be invalid *unless* it was a valid compensating tax.

As we have shown, *Armco* is not the overruling case. Only after *Tyler Pipe* does a valid compensating tax now require a credit for taxes paid to other states. 107 S.Ct. at 2819. However, after *Armco* no such credit was required. In *Williams v. Vermont*, 472 U.S. 14, 22 (1985), which was decided one term after *Armco*, this Court again refused to strike down a use tax owing to the risk of multiple burden caused by the failure to allow a credit for taxes paid to another state.[5] See *Tyler Pipe*, 107 S.Ct. at 2824 (Scalia, J., dissenting).

To be sure, in *Armco* West Virginia argued that its wholesaling tax was valid as a compensating tax. This Court rejected the argument, however, because of differ-

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[5] In *Williams* this Court did subsequently invalidate the use tax because it violated the Equal Protection Clause. 472 U.S. at 27.

ences in the rate and measure of West Virginia's wholesaling and manufacturing taxes. According to this Court, these differences "[make] clear that the manufacturing tax is just that, and not in part a proxy for the gross receipts tax" on selling. 467 U.S. at 643. In contrast, this Court in *Tyler Pipe* recognized that the rate and measure of Washington's selling and manufacturing B&O taxes were essentially the same. 107 S.Ct. at 2813. This Court focused instead on the failure of the multiple activities exemption to encompass another state's gross receipts taxes. In so doing *Tyler Pipe* overruled critical past precedent.

NCC makes much of a memorandum from the Director of Revenue to the Governor of the State of Washington dated June 14, 1984 (Exhibit 32). J.S. at 4 and 14. The memorandum expresses concern about the impact of *Armco* on Washington. NCC argues that this memorandum establishes that the State did not rely on prior precedent. J.S. 14. We suggest that a preliminary analysis of *Armco*, issued two days after the decision was handed down, is not a definitive statement about the State's reliance. Ultimately, the existence of a new principle of law is a question of law to be determined by the courts. Accordingly, this memorandum is irrelevant.

B. The Purpose Factor — The Purpose of the Commerce Clause Would not be Impaired by Prospective Application of Tyler Pipe.

The second factor is purpose. The test is "whether retrospective operation will further or retard" the operation of the new rule. *Chevron*, 404 U.S. at 107. In *National Can*, 109 Wn.2d at 888-90 (J.S. 11a-13a) the Washington Supreme Court determined that purely prospective application of *Tyler Pipe* would not retard the Commerce Clause purpose of promoting an area of free trade among the states. The court concluded that "whatever chill was imposed on interstate trade is in the past." 109 Wn.2d at

888. J.S. 11a. Indeed, it is difficult to imagine that free trade among the states was actually chilled in this case. NCC contends that few other jurisdictions have similar taxes. Thus, the risk of multiple burden present in the multiple activities exemption "was not in fact an actual double burden for most of these litigants." 109 Wn.2d at 889. J.S. 12a.

Retroactive application of *Tyler Pipe* would actually frustrate the Commerce Clause policy that interstate commerce should pay its fair share of the cost of state government by creating "a window of tax-free time for taxpayers involved in interstate commerce to the detriment of all other taxpayers." 109 Wn2d at 890. J.S. 12a. The court thus recognized that the refunds demanded by NCC would constitute a windfall. For if the multiple activities exemption had encompassed another state's taxes in the first place, NCC would have been entitled to no refunds whatsoever.

In discussing the purpose factor NCC abandons its claim that the Washington Supreme Court "reshaped" the *Chevron* factors. J.S. 6. NCC does not dispute the court's evaluation of the purpose of the Commerce Clause or its analysis of the purpose factor. Instead, NCC contends that any prospective application in a Commerce Clause case will encourage future discrimination. J.S. 16. Thus, NCC argues that there should be no prospective application—even if all three of the *Chevron* factors are satisfied. NCC advances two reasons to support its argument.

First, NCC asserts that any prospective application will encourage discrimination. This contention ignores the three *Chevron* factors. The first factor, reliance, constitutes the critical threshold. A party cannot obtain prospective application unless this Court establishes a new principle of law. Here, *Tyler Pipe* established a new principle of law by overruling past precedent.

As part of its argument, NCC criticizes Washington's prior conduct of turning its tax system "inside out" after a

portion of the system was invalidated in *Columbia Steel Co. v. State*, 30 Wn.2d 658, 192 P.2d 976 (1948). J.S. 16. Of course, NCC neglects to mention that the new tax system, enacted in 1950, was subsequently challenged and sustained by the Washington Supreme Court and this Court. See Section I(A)(2), *supra.*, p. 9-10. Thus, *National Can* is not an open invitation for states to pass unconstitutional tax statutes and then seek prospective only application of adverse decisions.

NCC's second argument contends that giving *Tyler Pipe* only prospective application — even if all three *Chevron* factors are met — will discourage litigation. J.S. 17. This fear is unfounded.[7] Application of judicial decisions on a purely prospective basis has been a possibility recognized by this Court since at least 1932 when this Court approved the practice in *Great Northern Railway Co. v. Sunburst Oil & Refining Co.*, 287 U.S. 358 (1932). Despite this possibility, there has been no appreciable drop in litigation at either the state or federal level. As the court observed in *National Can*, "taxpayers always have the incentive to challenge potentially unconstitutional tax statutes to avoid future tax liability." 109 Wn.2d at 890. J.S. 13a.

C. The Inequity Factor — It Would be Inequitable to Apply Tyler Pipe Retroactively and Require Refunds in this Case.

The third factor is inequity. The test is whether retroactive application of the court's decision will "produce substantial inequitable results." *Chevron*, 404 U.S. at 107. In *National Can*, 109 Wn.2d 890-92 (J.S. 13a-16a) the Washington Supreme Court concluded that

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[7] A number of commentators concur that the fear of drying up litigation is overblown. Auerbach, Garrison, Hurst & Mermin, *The Legal Process*, 176-77 (1961); Traynor, *Quo Vadis, Prospective Overruling: A Question of Judicial Responsibility*, 28 Hastings L. J. 533, 546-47 (1977); and Beytagh, *Ten Years of Non-Retroactivity: A Critique and a Proposal*, 61 Va. L. Rev. 1557, 1613-14 (1975).

retroactive application of *Tyler Pipe* would be inequitable because "[r]efunds sought in these cases alone exceed $56 million and the State estimates refunds from 1980 through 1984 could be in excess of $423 million." 109 Wn.2d at 892. J.S. 15a. The court also emphasized that the State's "reliance was justified by the presumptive validity of the tax statute and the case law upholding that statute." 109 Wn.2d at 892. J.S. 15a-16a.

Once again, the Washington Supreme Court did not "reshape" the inequity factor. The court's analysis is virtually identical to the analysis of this Court in *Arizona Governing Committee for Tax Deferred Annuity and Deferred Compensation Plans v. Norris*, 463 U.S. 1073 (1983). In *Norris* this Court was concerned about the cost to the state if the decision was applied retroactively. As stated by Justice Powell:

> Imposing such unanticipated financial burdens would come at a time when many States and local governments are struggling to meet substantial fiscal deficits. Income, excise, and property taxes are being increased. There is no justification for this Court * * * to impose this magnitude of burden retroactively on the public. Accordingly, liability should be prospective only.

463 U.S. at 1106-7.

NCC, itself, tries to reshape this factor by arguing that it is ability to pay rather than hardship that governs inequity. J.S. 18 n.28. As Justice Powell states in *Norris*, the question is hardship. The State should not be put to the hardship of raising taxes or slashing programs to pay refunds.

It is again important to remember that the taxpayers in this case suffered no actual harm from the now invalid multiple activities exemption. This Court invalidated the exemption because it did not accommodate the risk of multiple burden for taxpayers potentially subject to taxes of other states.

NCC also argues, incorrectly, that the State created its own hardship by collecting the revenue. J.S. 18. Prior

to December 31, 1984, when the bulk of the actions consolidated in this case were filed, NCC and the other appellants did not even seek relief. Afterwards, the State continued to collect the tax because the trial court and the Washington Supreme Court ruled that the multiple activities exemption was valid, relying on past precedent.

II. NATIONAL CAN DOES NOT RENDER THIS COURT'S OPINION IN TYLER PIPE ADVISORY, FOR TYLER PIPE APPLIES PROSPECTIVELY TO NCC.

National Can, 109 Wn.2d 878 (1988) held that *Tyler Pipe*, 107 S.Ct. 2810 (1987) does not apply retroactively. From this NCC argues that the Washington Supreme Court rendered *Tyler Pipe* an advisory opinion in violation of Article III, § 2 of the U.S. Constitution. J.S. 5-6 and 7-10. This is not a significant question. Indeed, NCC itself recognized in the proceeding below that this case presents no significant Article III question. Although NCC now claims this question is substantial, its discussion of Article III was limited to a single paragraph at the end of one of its briefs in the proceeding below. See Brief of Appellant Xerox Corporation on Remand From the Supreme Court of the United States at 47-8, *National Can*. The Washington Supreme Court did not even pass upon this question.[10]

NCC's Article III argument is incorrect for two reasons. First, this Court has the power to apply its decisions only prospectively to the litigants before it. Second, *Tyler*

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[10]Nor did the court pass on a Supremacy Clause question, since NCC did not raise the issue below. NCC's Supremacy Clause argument here is at best unclear but appears premised on a contention that this Court would never permit a lower court to give only prospective application to one of its decisions. J.S. 7. In this sense, NCC's argument may be suggesting that the Supremacy Clause imposes upon the State Supreme Court the same requirements that Article III imposes upon this Court. Yet, as we will see, *infra*., p. 21-23, Article III can thus hardly impose, via the Supremacy Clause, such a requirement on the State Supreme Court.

Pipe is not advisory, for it prospectively determines the rights and obligations of the parties in this case.

A. This Court Has the Power to Apply its Decisions Only Prospectively to the Litigants Before it.

NCC contends that the Washington Supreme Court's decision is "unprecedented and offensive to the mandate * * * of Article III." J.S. 5. Essentially, NCC argues that under Article III this Court is without power to apply its decisions only prospectively to the litigants before it in a civil proceeding, or to put it another way, that the litigants must *always* be granted retroactive relief.

NCC's contention is contrary to the decisions of this Court. In both *Lemon v. Kurtzman*, 411 U.S. 192 (1973) (*Lemon II*) and *Norris*, 463 U.S. 1073 (1983), this Court refused to apply its decisions retroactively to the successful litigants before it.[11]

Lemon II came after *Lemon v. Kurtzman*, 403 U.S. 602 (1971) (*Lemon I*) in which this Court struck down a law allowing the state to reimburse nonpublic sectarian schools for certain services and remanded to the three judge district court for further proceedings. The district court applied *Lemon I* only prospectively, enjoining future payments under the invalid law but allowing payments for services performed prior to *Lemon I*. 411 U.S. at 194. In *Lemon II* this Court affirmed the district court decision.

In *Norris* this Court ruled that Title VII of the Civil Rights Act of 1964 prohibits an employer from offering an

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[11] *Simpson v. Union Oil Co.*, 396 U.S. 13 (1969) (*Simpson II*), cited by NCC, is not to the contrary. In *Simpson II* this Court merely held that the prospective application question reserved in its prior opinion, *Simpson v. Union Oil Co.* 377 U.S. 13, 24-5 (1964), applied to litigants other than those before this Court. In *Tyler Pipe* this Court specifically remanded so the Washington Supreme Court could decide the question of prospective application with regard to NCC. 107 S.Ct. at 2822. We also note that *Simpson II* termed prospective application "most unusual" when "the rule announced was not innovative." 396 U.S. at 14. Of course, in this case the new rule is "innovative" for *Tyler Pipe* established a new principle of law by overruling past precedent.

annuity plan which uses sex based tables for calculating benefits. However, again, this Court ruled that the decision only applies to benefits derived from contributions collected after the effective date of *Norris*. 463 U.S. at 1111 (O'Connor, J., concurring).

Clearly NCC is incorrect in its assertion that this Court lacks the power to apply its decisions only prospectively to the litigants before it. Indeed, if the federal district court in *Lemon II* can refuse to apply this Court's civil decisions retroactively, the Washington Supreme Court does not violate Article III if it makes a similar decision.

B. National Can Applies This Court's Opinion in Tyler Pipe Prospectively to NCC.

National Can does not render *Tyler Pipe* advisory. NCC's entire argument on this point rests on a misrepresentation of the decision below. NCC states that the Washington Supreme Court "has refused to apply this Court's substantive constitutional determination to the parties." J.S. 7. This statement is clearly in error. *National Can* held that *Tyler Pipe* does not apply retroactively. However, *Tyler Pipe* clearly applies to NCC prospectively. After *Tyler Pipe* the State had the choice of foregoing future collection of taxes from NCC or amending its tax laws in response to this Court's decision.[12] In this respect *National Can* is similar to *Lemon II* and *Norris*. All three courts applied the new principles of law prospectively, but refused retroactive relief.

These decisions were not rendered advisory by being applied only prospectively. This is best demonstrated by asking whether this Court would have jurisdiction under Article III if the only issue were the prospective applica-

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[12]As we have previously explained, *supra*., p. 2-3, on August 10, 1987, the Washington legislature met in special session and repealed the multiple activities exemption. Following this Court's lead the legislature replaced the exemption with a system of credits. See Laws 1987, 2nd ex. sess., ch. 3. App. A.

tion of the law, with no refund question involved at all. This Court has found a case or controversy in tax cases under Article III even when the plaintiff was not seeking a tax refund.

In *Boston Stock Exchange v. State Tax Commission*, 429 U.S. 318 (1977) six regional stock exchanges challenged, on Commerce Clause grounds the New York tax on stock transactions. These exchanges were not subject to the tax and thus were not seeking a refund. Nevertheless, this Court ruled that these exchanges had standing under Article III. 429 U.S. at 320 n.3. In *Nashville, Chattanooga, and St. Louis Railway v. Wallace*, 288 U.S. 249, 263-65 (1932) this Court held that a declaratory judgment action to invalidate a tax constituted a case or controversy under Article III, even though the taxpayer sought no refund. See also *Department of Revenue of the State of Washington v. Association of Washington Stevedoring Companies*, 435 U.S. 734 (1978) which involved a declaratory judgment action to invalidate a Department of Revenue rule. Again, no refunds were involved. Clearly, there is nothing in Article III that requires this Court to apply its decisions both prospectively and retroactively to the parties before it.

NCC also cites *Griffith v. Kentucky*, 479 U.S. ___, 107 S.Ct. 708 (1987) and *Stovall v. Denno*, 388 U.S. 293 (1967). J.S. 7 and 9. These decisions are not inconsistent with *Lemon II*, *Norris* or *National Can*, because they involve criminal proceedings. Retroactivity in civil proceedings continues to be governed by *Chevron*, 404 U.S. 97 (1971). *Griffith*, 107 S.Ct. at 713 n.8. This difference makes sense in terms of Article III. In a criminal proceeding the party before the court will receive no benefit unless a new rule is applied retroactively and a conviction is invalidated. As we have seen, this is not true in civil proceedings and particularly in a tax case, where a litigant is relieved of future tax liability.

CONCLUSION

For the reasons given above, this appeal should be dismissed or, in the alterntive, the judgment should be affirmed.[13]

DATED THIS 29th DAY OF APRIL, 1988.

Respectfully submitted,

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[13] If NCC's Jurisdictional Statement is considered — as it should be — as a petition for writ of certiorari pursuant to 28 U.S.C. § 2103, NCC's petition should be denied.

APPENDIX A

Wash. Rev. Code § 82.04.440, As Amended By Laws 1987, 2nd ex. sess., ch. 3.

(1) Every person engaged in activities which are within the purview of the provisions of two or more of sections RCW 82.04.230 to 82.04.290, inclusive, shall be taxable under each paragraph applicable to the activities engaged in.

(2) Persons taxable under RCW 82.04.250 or 82.04.270 shall be allowed a credit against those taxes for any (a) manufacturing taxes paid with respect to the manufacturing of products so sold in this state, and/or (b) extracting taxes paid with respect to the extracting of products so sold in this state or ingredients of products so sold in this state. Extracting taxes taken as credit under subsection (3) of this section may also be taken under this subsection, if otherwise allowable under this subsection. The amount of the credit shall not exceed the tax liability arising under this chapter with respect to the sale of those products.

(3) Persons taxable under RCW 82.04.250 or 82.04.260 subsection (4) shall be allowed a credit against those taxes for any extracting taxes paid with respect to extracting the ingredients of the products so manufactured in this state. The amount of the credit shall not exceed the tax liability arising under this chapter with respect to the manufacturing of those products.

(4) Persons taxable under RCW 82.04.230, 82.04.240, or subsection (2), (3), (4), (5), or (7) of RCW 82.04.260 with respect to extracting or manufacturing products in this state shall be allowed a credit against those taxes for any (i) gross receipts taxes paid to another state with respect to the sales of the products so extacted or manufactured in this state, (ii) manufacturing taxes paid with respect to the manufacturing of products using ingredients so extracted in this state, or (iii) manufacturing taxes

paid with respect to manufacturing activities completed in another state for products so manufactured in this state. The amount of the credit shall not exceed the tax liability arising under this chapter with respect to the extraction or manufacturing of those products.

(5) For the purpose of this section:

(a) "Gross receipts tax" means a tax:

(i) "Which is imposed on or measured by the gross volume of business, in terms of gross receipts or in other terms, and in the determination of which the deductions allowed would not constitute the tax an income tax or value added tax; and

(ii) Which is also not, pursuant to law or custom, separately stated from the sales price.

(b) "State" means (i) the state of Washington, (ii) a state of the United States other than Washington, or any political subdivision of such other state, (iii) the District of Columbia, and (iv) any foreign country or political subdivision thereof.

(c) "Manufacturing tax" means a gross receipts tax imposed on the act or privilege of engaging in business as a manufacturer, and includes (i) the taxes, imposed in RCW 82.04.240 and subsections (2), (3), (4), (5), and (7) of RCW 82.04.260, and (ii) similar gross receipts taxes paid to other states.

(d) "Extracting tax" means a gross receipts tax imposed on the act or privilege of engaging in business as an extractor, and includes the tax imposed in RCW 82.04.230 and similar gross receipts taxes paid to other states.

(e) "Business", "manufacturer", "extractor", and other terms used in this section have the meanings given in RCW 82.04.020 through 82.04.212, notwithstanding the use of those terms in the context of describing taxes imposed by other states. [1987 2nd ex.s. c 3 § 2]

The legislature finds that the invalidation of the multiple activities exemption contained in RCW 82.04.440 by the United States Supreme Court now requires adjustments to the state's business and occupation tax to

achieve consitutional equality between Washington taxpayers who have conducted and will continue to conduct business in interstate and intrastate commerce. It is the intent of this act to preserve the integrity of Washington's business and occupation tax system and impose only that financial burden upon the state necessary to establish parity in taxation between such taxpayers.

Thus, this act extends the system of credits originated in RCW 82.04.440 in 1985 to provide for equal treatment of taxpayers engaging in extracting, manufacturing or selling regardless of the location in which any of such activities occurs. It is further intended that RCW 82.04.440, as amended by section 2 of this act, shall be construed and applied in a manner that will eliminate unconstitutional discrimination between taxpayers and ensure the preservation and collection of revenues from the conduct of multiple activities in which taxpayers in this state may engage. [1987 2nd ex.s. c 3 § 1]

If it is determined by a court of competent jurisdiction, in a judgment not subject to review, that relief is appropriate for any tax reporting periods before August 11, 1987, in respect to RCW 82.04.440 as it existed before August 11, 1987, it is the intent of the legislature that the credits provided in RCW 82.04.440 as amended by section 2 of this act shall be applied to such reporting periods and that relief for such periods be limited to the granting of such credits. [1987 2nd ex.s. c 3 § 3]

If any provision of this act or its application to anay person or circumstance is held invalid, the remainder of the act or the application of the provision to other persons or circumstances is not affected. [1987 2nd ex.s. c 3 § 4]

No. 87-1629

IN THE

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OCTOBER TERM, 1987

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Appellants,

v.

STATE OF WASHINGTON DEPARTMENT OF REVENUE,
Appellee.

On Appeal from the Supreme Court of Washington

BRIEF OF TAX EXECUTIVES INSTITUTE, INC. AS AMICUS CURIAE IN SUPPORT OF APPELLANTS' JURISDICTIONAL STATEMENT

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INTEREST OF AMICUS CURIAE

Pursuant to Rule 36 of the Rules of this Court, Tax Executives Institute, Inc. respectfully submits this brief as *amicus curiae* in support of Appellants' jurisdictional statement in this case.[1]

Amicus Tax Executives Institute, Inc. (TEI) is a voluntary, nonprofit association of corporate and other busi-

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[1] Tax Executives Institute has requested and received the written consent of the Appellants and Appellee to the filing of this brief; those consents have been filed with the Clerk of the Court.

ness executives, managers, and administrators who are responsible for the tax affairs of their employers. The Institute was organized in 1944 and currently has approximately 4,000 members who represent more than 2,000 of the leading corporations in the United States and Canada. TEI members represent a cross-section of the business community in North America, and the companies represented by the Institute's membership are, almost without exception, engaged in interstate commerce. The Institute is dedicated to promoting the uniform and equitable enforcement of the tax laws throughout the nation and to reducing the costs and burdens of administration and compliance to the benefit of both the government and taxpayers.

This case addresses the extent to which a State may eviscerate a decision by this Court that a state tax statute unconstitutionally infringes upon interstate commerce by choosing to apply that decision on a prospective-only basis. Last term, in *Tyler Pipe Industries, Inc. v. Washington Department of Revenue*, 107 S. Ct. 2810 (1987), the Court invalidated the multiple activities exemption of Washington State's business and occupation (B&O) tax as repugnant to the Constitution's Commerce Clause. *See* U.S. Const. art. I, § 8, cl. 3. Earlier this year, the Washington Supreme Court, applying the standard set forth in *Chevron Oil Co. v. Huson*, 404 U.S. 97 (1971), concluded that the Court's finding of unconstitutionality should apply on a prospective-only basis and consequently denied the Appellants' claims for refund in respect of the unconstitutionally imposed and collected taxes.[2] 109 Wash. 2d 878, 749 P.2d 1286 (1988), *reprinted in* Ap-

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[2] The Court in *Tyler Pipe* concluded that since the refund isues "are essentially issues of remedy for the imposition of a tax that unconstitutionally discriminated against interstate commerce," they were appropriately considered in the first instance by the Supreme Court of Washington. 107 S. Ct. at 2823, *quoting Bacchus Imports, Ltd. v. Dias*, 468 U.S. 263, 277 (1984).

pendix A to Appellant's Jurisdictional Statement (App.). It is that conclusion which Appellants—National Can Corporation and 70 other taxpayers—seek to have reviewed.

Tax Executives Institute supports the Appellants' jurisdictional statement because its members have a vital interest in the resolution of the prospective-only issue. A decision by the Court in this case promises to affect far more than the State of Washington's ability to retain the unconstitutional taxes it has collected from a discrete class of taxpayers. The Institute is concerned that the Washington court's decision, if not clarified, could substantially dilute the protection intended by the Commerce Clause. If the Court declines to note probable jurisdiction in this case, courts and legislatures in other States may well conclude that the Constitution does not bar either the *enactment* of tax statutes that discriminate against interstate commerce or even the *collection* of discriminatory taxes *pendente lite*, but rather only the continued collection of discriminatory taxes after the unconstitutionality of the statutes is explicitly confirmed by the Court. Indeed, a disturbing trend in that direction can already be discerned—*see, e.g., American Trucking Associations v. Gray*, No. 85-101, 1988 Westlaw 21852 (Ark. Mar. 14, 1988) (amended Apr. 26, 1988), *to be reported at* 295 Ark. 43, 746 S.W.2d 377 (1988) (the Court's finding of unconstitutionality in *American Trucking Associations v. Scheiner*, 107 S. Ct. 2829 (1987), will be applied on a prospective-only basis).

Obversely, if the Court notes probable jurisdiction and clarifies the standards to be used in determining the retroactive effect to be given to decisions holding tax statutes to be unconstitutional, the right of all taxpayers to be free from taxes that impose undue burdens on interstate commerce will be vindicated and the Commerce Clause itself will be vivified.

Because TEI members and the companies by whom they are employed would be materially and adversely

affected by the "unreasonable clog upon the mobility of commerce," *Baldwin v. G.A.F. Seelig, Inc.*, 294 U.S. 511, 527 (1935), that could result from the Washington court's decision, the Institute has a special and direct interest in the outcome of this case.

ARGUMENT

I.

The constitutionality of the State of Washington's business and occupation tax has been a matter of dispute for more than 40 years. In 1948, the Washington Supreme Court held that the B&O tax then in effect (which contained a wholesale tax exemption for local manufacturers) discriminated against interstate commerce and therefore violated the Commerce Clause of the Constitution. *Columbia Steel Co. v. State*, 30 Wash. 2d 658, 192 P.2d 976 (1948). In an effort to address the state court's concerns, the Washington legislature two years later turned the statute "inside out."[3] The amended statute, however, was ultimately found to have "essentially the same economic effect on interstate sales . . . [while having] the advantage of appearing nondiscriminatory." *General Motors Corp. v. Washington*, 377 U.S. 436, 460 (1964) (Goldberg, J., with Stewart and White, JJ., dissenting),[4] *quoted with approval in Tyler Pipe*, 107 S. Ct. at 2815. Last term, in *Tyler Pipe*, the Court confirmed

[3] As described by the Court in *Tyler Pipe*, "[t]he legislature removed the wholesale tax exemption for local manufacturers and replaced it with an exemption from the manufacturing tax for the portion of manufacturers' output that is subject to the wholesale tax." 107 S. Ct. at 2814 (footnote omitted).

[4] In *General Motors*, a divided Court rejected the taxpayer's claims that the statute unconstitutionally taxed unapportioned gross receipts and did not bear a reasonable relation to the taxpayer's in-state activities; the Court did not reach the argument that the tax imposed multiple burdens on interstate transactions. 377 U.S. at 449.

that the effect, not the mere appearance or form, of the tax scheme was controlling and therefore invalidated the multiple activities exemption from the B&O tax as constitutionally repugnant. In doing so, the Court expressly relied on its 1984 decision in *Armco Inc. v. Hardesty*, 467 U.S. 638 (1984), writing:

> Washington's multiple activities exemption discriminates against interstate commerce as did the tax struck down by the Washington Supreme Court in 1948 and the West Virginia tax that we invalidated in *Armco*.

107 S. Ct. at 2820.[5]

The Court in *Tyler Pipe* did not reach the issue of the prospective effect to be given to its holding and, hence, the disposition of the taxpayers' claims for refund. Characterizing those issues as ones of remedy, the Court remanded the case to the Washington Supreme Court "to address in the first instance the refund issues raised by our rulings in these cases." 107 S. Ct. at 2823. The Washington court concluded that this Court's decision should apply on a prospective-only basis. If that decision is not reviewed and the standard governing the retroactivity issue is not clarified, other States may conclude that they are free to deny refunds in all similar cases. Such a result could frustrate the policy underlying the Commerce Clause by allowing the States to enjoy the financial benefits of their discriminatory taxation—the fruits of their own unconstitutional acts.

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[5] *Armco* involved a West Virginia tax identical in principle to the Washington B&O tax. West Virginia imposed a gross receipts tax on persons selling tangible property at wholesale; local manufacturers were exempt from the tax because they paid a manufacturing tax on the value of products manufactured in the State. The Court invalidated the statute, thereby reinforcing the principle that "a State may not tax a transaction or incident more heavily when it crosses state lines than when it occurs entirely within the State." 467 U.S. at 642.

II.

Although the Constitution neither prohibits nor requires retrospective effect, *Linkletter v. Walker*, 381 U.S. 618, 629 (1965), the rule remains that "a legal system based on precedent has a built-in presumption of retroactivity." *Solem v. Stumes*, 465 U.S. 638, 642 (1984). *See* L. Tribe, *American Constitutional Law* 29-30 & n.20 (2d ed. 1988). Thus, although exceptions to the rule of retroactivity should be recognized as a matter of policy, the exceptions should not swallow the rule.

In respect of civil cases, the factors to be analyzed in resolving the retroactivity issue were set forth by the Court in *Chevron Oil Co. v. Huson*, 404 U.S. 97 (1971).[6] In that case, the Court held that in determining whether a decision should be accorded prospective-only treatment, the following three factors should be considered:

- *Reliance*: Whether the decision establishes a new principle of law or involves an issue of first impression whose resolution was not clearly foreseen.
- *Purpose*: Whether, based on the history of the rule in question, its purpose and effect, nonretroactive application will advance or retard the operation of the new rule.
- *Inequity*: Whether nonretroactive application is necessary to avoid injustice or hardship.

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[6] In *Griffith v. Kentucky*, 107 S. Ct. 708 (1987), which changed the analysis to be used in criminal procedure cases, the Court stated that *Chevron* continued to govern civil cases. 107 S. Ct. at 713 n.8. The *Chevron* case, however, did not involve the retroactive effect to be given to a ruling of *unconstitutionality*. Rather, the case addressed the reach of a decision that Louisiana's statute of limitations governed claims for personal injuries sustained on the Outer Continental Shelf off the coast of Louisiana. In *Chevron*, the Court held that its decision, *Rodrigue v. Aetna Casualty & Surety Co.*, 395 U.S. 352 (1969), should not apply retroactively to litigants who had relied on several federal cases holding that admiralty law (specifically, the doctrine of laches) controlled the issue. 404 U.S. at 109.

404 U.S. at 106-07. *See* Tatarowicz, *Right to a Refund for Unconstitutionally Discriminatory State Taxes and Other Controversial State Tax Issues Under the Commerce Clause*, 41 Tax Lawyer 103, 138-39 (1987).

The Supreme Court of Washington construed *Chevron* to permit the application of *Tyler Pipe* on a prospective-only basis. In doing so, the court transmogrified the three-part test of *Chevron* into a standard so pliable that virtually all rulings of unconstitutionality could be applied, at a State's choosing, on a prospective-only basis.

Consider, for example, *Chevron*'s threshold requirement that the decision at issue must establish a new principle of law before it can be applied on a prospective-only basis.[7] The principle that discrimination against interstate commerce in the exercise of local taxing authority is constitutionally proscribed is far from new. Even before *Armco*, this Court had clearly ruled that the Commerce Clause proscribed tax statutes treating interstate businesses less favorably than local businesses. *See, e.g., Boston Stock Exchange v. State Tax Commission*, 429 U.S. 318, 331-32 (1977); *Maryland v. Louisiana*, 451 U.S. 725, 759 (1981) ("[t]he common thread running through the cases upholding compensatory taxes is the equality between local and interstate commerce," *citing Boston Stock Exchange* and *Henneford v. Silas Mason Co.*, 300 U.S. 577, 583-84 (1937)).

These precedents notwithstanding, the Washington court nimbly concluded that *Tyler Pipe* represented a clear break from prior rulings (including *Armco*), even though the Court in *Tyler Pipe* expressly relied on those rulings. App. 5a; *see* 107 S. Ct. at 2816, 2820. In reach-

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[7] The court below correctly noted that if the reliance ("new principle") requirement is not met, the decision must be applied retroactively; *Chevron*'s other two factors need not be considered. App. 4a. *See United States v. Johnson*, 457 U.S. 537, 550 n.12 (1982).

ing this result, the court cited its own ruling in *National Can Corp. v. Department of Revenue*, 105 Wash. 2d 327, 715 P.2d 128 (1986), as evidence that *Armco* did not foreshadow the result in *Tyler Pipe*. App. 5a. It was that decision, however, which *Tyler Pipe* reversed![8] To conclude that a State's own misreading of precedent relieves it of its responsibility to follow that precedent would itself represent a "clear break" from sound and established principles of adjudication and could send a disturbing signal to other States: perhaps ignorance of the law *is* an excuse.[9]

With equal aplomb, the Washington court concluded that the purpose of the Commerce Clause would not be enhanced by the retroactive application of *Tyler Pipe*. App. 13a. The court blithely stated: "It is difficult to understand how retroactive application would encourage free trade among the states since whatever chill was imposed on interstate commerce is in the past . . . ." App. 11a. Under such a reading of *Chevron's* purpose test, a ruling of unconstitutionality would never be applied retroactively and the States would have an incentive to enact unconstitutional statutes.[10] The overall result, therefore, would be to retard the purpose of the Commerce Clause.

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[8] *See* Tatarowicz, *supra*, 41 Tax Lawyer at 141 (the result in *Tyler Pipe* "was clearly foreshadowed by the Supreme Court's decision in *Armco*").

[9] *See Chapman v. California*, 386 U.S. 18, 21 (1967) (criminal procedure case) ("we cannot leave to the States the formulation of the authoritative laws, rules, and remedies designed to protect people from infractions by the States of federally guaranteed rights").

[10] *See* Tatarowicz, *supra*, 41 Tax Lawyer at 141-42 ("the practical effect [of prospective-only application] would be to permit states the financial benefits of discriminatory taxation. A state could enact tax laws without concern for constitutional limitation, knowing that, if such laws were ultimately found to discriminate against

The Washington court's analysis of the inequity test in *Chevron* is especially beguiling. Under *Chevron*, the issue is whether prospective application is necessary to avoid injustice or undue hardship. In applying the test, the court below focused on the State of Washington's reliance on the unconstitutionally imposed and collected taxes, stating that "the expenditures made from this revenue . . . cannot be undone, and reimbursement at this point would pose a significant hardship upon the State's existing financial requirements." App. 15a.

If such a "hardship" were deemed sufficient to justify prospective treatment, however, unconstitutional tax statutes would rarely, if ever, be overturned retroactively. States invariably spend the revenues they collect. The sounder approach is to examine whether *undue* hardship would result from retroactive application of a decision. Under such an analysis, a different result obtains, for the "hardship" of which the State complains is one of its own making—the result of its own unconstitutional acts.[11]

In this regard, it is instructive to consider those cases in which the Court has provided relief under the inequity

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interstate commerce, they could be repealed with impunity. . . [T]he prospective application of a finding of unconstitutionality retards the purpose of the commerce clause by offering the inducement of clear financial advantage to those states that violate it.").

[11] The "hardship," moreover, could have been substantially mitigated had the State heeded the advice of its own Director of Revenue who, two days after this Court's decision in *Armco*, advised the Governor that "the reasoning of the Court in the *Armco* decision is clearly applicable to our statutory arrangement . . . ." Memorandum to the Honorable John Spellman, Governor, from Donald R. Burrows, Washington State Director of Revenue (June 14, 1984), *reprinted in* App. 80a (Exhibit F). Had the Director's concern been acted upon, the collection of unconstitutional taxes could have ended more than three years before the Court's decision in *Tyler Pipe*. Instead, the State continued its efforts to enforce the discriminatory taxes in violation of the Commerce Clause, thereby exacerbating the "hardship" of which it now complains.

prong of the *Chevron* test (or comparable standards). For example, in *Lemon v. Kurtzman*, 411 U.S. 192 (1973) (*Lemon II*), the Court limited the effect of its decision two years earlier in *Lemon v. Kurtzman*, 403 U.S. 602 (1971) (*Lemon I*), which invalidated, on First Amendment grounds, a Pennsylvania statute authorizing State reimbursement to private sectarian schools for certain educational services provided by the schools. The hardships of which the Court was concerned in that case were not the State's but rather the schools that had provided services and incurred expenses in reliance on the constitutionally defective statute. 411 U.S. at 203. (Indeed, the State would have been relieved of a financial burden had the Court applied its decision on a retroactive basis.) Similarly, in *Cipriano v. City of Houma*, 395 U.S. 701 (1969), the Court limited the retroactive effect of a decision holding unconstitutional a Louisiana statute permitting only property taxpayers to vote on elections called to approve the issuance of public utility revenue bonds. The hardship addressed by the Court was again not the State's but rather that which would have been suffered by cities and bondholders (who had relied on the state law) had the decision been applied retroactively. 395 U.S. at 706.[12]

Even assuming a State could demonstrate that it would suffer an undue hardship if compelled to refund immediately all unconstitutionally collected taxes, it does not follow—as the Washington court concluded—that the

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[12] *See also Northern Pipeline Construction Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 87-88 (1982) (decision holding the Bankruptcy Act of 1980 unconstitutional applied prospectively because of the substantial injustice and hardship that would otherwise be visited upon litigants who had relied on the statute); *Los Angeles Department of Water and Power v. Manhart*, 422 U.S. 702, 722-23 (1978) (decision that city department's employee benefit plan violated Title VII of the Civil Rights Act of 1964, as amended, applied prospectively because of "devastating" effect retroactivity could have "in large part on innocent third parties"—covered employees).

wronged taxpayers should receive nothing.[13] In appropriate cases, the State might—perhaps under guidelines prescribed by the legislature—craft a refund policy that minimizes the "inequity" the State might otherwise suffer. For example, a State might provide that the taxes unconstitutionally collected (plus an interest factor) could be claimed as a credit on the affected taxpayers' future years' tax returns.[14]

In summary, the Washington court misapprehended all three of the tests set forth in *Chevron*. Its analysis of *Chevron*, if not clarified, could be used to sanction prospective-only application in respect of virtually all decisions declaring state tax statutes unconstitutional. Such a result would be pernicious—nullifying the Court's decision in *Tyler Pipe* and frustrating the policy underlying the Commerce Clause.

III.

The questions presented by this case are substantial not only because the Washington court's decision threatens to eviscerate this Court's holding in *Tyler Pipe*, but because the Washington case is but one recent example of the States' misconstruing both the requirements of the Commerce Clause and the standard set forth in *Chevron*. Indeed, during the past five years, there has been a veritable wave of state court decisions in which discriminatory statutes have been found, in essence, to be unconstitutional on a prospective-only basis.

For example, the State of West Virginia is now contending in the remand of *Ashland Oil, Inc. v. Rose*, 350

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[13] Obviously, the hardship that would be suffered by the State in such an instance would be no greater than the hardship collectively suffered by the taxpayers from whom the taxes were unconstitutionally exacted.

[14] Tatarowicz, *supra*, 41 Tax Lawyer at 143 & n.248. Alternatively, the taxes at issue could be refunded in installments. 41 Tax Lawyer at 143.

S.E.2d 531 (W. Va. 1986), *appeal dismissed for want of final judgment*, 107 U.S. 1949 (1987) (remand pending), that this Court's decision in *Armco* should be applied only to Armco. Similarly, many states have refused to give effect to, and are refusing to pay refunds, under the Court's decision in *American Trucking Associations v. Scheiner*, 107 S. Ct. 2829 (1987). *See, e.g., American Trucking Associations v. Gray*, No. 85-101, 1988 Westlaw 21852 (Ark. Mar. 14, 1988) (amended Apr. 26, 1988), *to be reported at* 295 Ark. 43, 746 S.W.2d 377 (1988). Another example is *Division of Alcoholic Beverages & Tobacco v. McKesson Corp.*, No. 70,368, 13 Fla. L.W. 120, 1988 Westlaw 12553 (Fla. Feb. 18, 1988). In that case, the Florida Supreme Court held that, even though the State's tax granting preferential treatment to alcoholic beverages made from Florida's crops and manufactured and bottled in Florida is unconstitutional under *Bacchus Imports, Ltd. v. Dias*, 468 U.S. 263 (1984), the holding should be prospective only because of Florida's alleged "good faith reliance on a presumptively valid statute." *See also Penn Mutual Life Insurance Co. v. Department of Licensing and Regulation*, 162 Mich. App. 123, 412 N.W.2d 668 (Mich. App. 1987) and *Metropolitan Life Insurance Co. v. Commisisoner of Insurance*, 373 N.W.2d 399 (N.D. 1985), which both held that the Court's decision in *Metropolitan Life Insurance Co. v. Ward*, 470 U.S. 869 (1985), invalidating a provision taxing foreign insurers, should apply on a prospective-only basis.[15]

McKesson, *Ashland Oil*, and *American Trucking Associations*—especially when viewed in conjunction with the case at hand—vividly illustrate that the States, at best, misunderstand the balance that is to be struck in considering the retroactivity question and, at worst, have virtually no regard for the policy underlying the Com-

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[15] For a list of other cases in which state courts have applied decisions that a tax is unconstitutional on a prospective-only basis, see Tatarowicz, *supra*, 41 Tax Lawyer at 117-18 n.89.

merce Clause or for the precedents of this Court. State after state has adopted what can be described as a "heads I win, tails you lose" approach to cases implicating the Commerce Clause's proscription on discriminatory tax statutes. If a State prevails in litigation and the challenged statute is sustained, all taxpayers (rightfully) lose. But if a State loses and the statute is found to be constitutionally deficient, the State then declares that the decision established a "new principle" and, therefore, that it should receive prospective-only application. As a result, all taxpayers (with the possible exception of the victorious litigant) lose.

Such adroit reading of precedent and deft, self-serving application of *Chevron* may enrich the particular State's fisc, but the results can hardly be said to foster the policy underlying the Commerce Clause. If not clarified, the decision below might not only lead States to be less sensitive to Commerce Clause concerns but also discourage taxpayers from challenging clearly discriminatory tax statutes. These facts remain:

- The enactment of discriminatory taxes violates the Constitution.
- The collection of discriminatory taxes violates the Constitution.
- The retention of discriminatory taxes violates the Constitution.

Concededly, the question of the refund of unconstitutionally imposed and collected taxes is one of remedy that is properly addressed in the first instance by state courts. *Tyler Pipe*, 107 S. Ct. at 2822-23. The remand from this Court in such cases, however, invariably requires that the lower court's disposition of the remedy question be "not inconsistent with this opinion." 107 S. Ct. at 2823. The wave of prospective-only holdings that have ensued fail the test of consistency—with respect both to the Commerce Clause and the Court's teaching in *Chevron*. It should be stopped.

IV.

Amicus Tax Executives Institute respectfully submits that, in light of the States' repeated misapplication of the *Chevron* standard, it may be appropriate for the Court not only to clarify and thereby vivify that standard, but to give consideration to the adoption of a new standard in respect of state tax statutes found to violate the Commerce Clause.

Last term in *Griffith v. Kentucky*, 107 S. Ct. 708 (1987), this Court considered—and found constitutionally repugnant—the racially discriminatory use by prosecutors of peremptory challenges. Declaring that "[t]he time for toleration has come to an end," 107 S. Ct. at 714, *quoting United States v. Johnson*, 457 U.S. 537, 555-56 n.16 (1982), the Court concluded that generally new rules for the conduct of criminal prosecutions will be applied retroactively to all pending or non-final cases even if they constitute a "clear break" with the past. 107 S. Ct. at 716. *See* L. Tribe, *American Constitutional Law* 31 n.26 (2d ed. 1988).

Although cases addressing the validity of discriminatory state tax statutes do not involve considerations of the same magnitude as those presented in criminal procedural cases (which pertain to the life and liberty of the defendant), such cases do implicate a constitutional right—an interstate business's right under the Commerce Clause to be free from undue state-imposed burdens. Thus, they involve rights different from, and indeed more significant than, those presented in *Chevron*.[16]

Perhaps more important, unlike the other civil cases in which the retroactivity issue has been considered, the unsuccessful litigant in a discriminatory state tax case—the party who seeks to have the finding of unconstitutionality applied on a prospective-only basis (the State)—is the progenitor of the proscribed (unconstitutional) ac-

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[16] *See* note 6, *supra*.

tion.[17] The States have it within their power to enact constitutional tax statutes. This fact alone suggests that the States should be held to a higher standard in obtaining exceptions to the general rule of retroactivity. They should not be permitted to reap the benefits of discriminatory taxation. The States' checkered history in enacting, collecting, and refusing to refund unconstitutional taxes only underscores this conclusion. As this Court stated in *Griffith*, "[t]he time for toleration has come to an end." 107 S. Ct. at 714.

CONCLUSION

For the foregoing reasons, the Court should note probable jurisdiction in this case and resolve the substantial issues raised by the decision of the court below.

Respectfully submitted,

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April 28, 1988

[17] *See* note 11, *supra*, and accompanying text.

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On Appeal from the Supreme Court of Washington

BRIEF OF AMICI CURIAE AMERICAN SIGN & INDICATOR CORP., *ET AL.*, IN SUPPORT OF THE JURISDICTIONAL STATEMENT

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BRIEF OF AMICI CURIAE AMERICAN SIGN & INDICATOR CORP., *ET AL.*, IN SUPPORT OF THE JURISDICTIONAL STATEMENT

STATEMENT OF INTEREST OF AMICI CURIAE

Amici are sixty corporations[1] engaged in interstate commerce, including activities in the State of Washing-

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[1] American Sign & Indicator Corp., Anderson, Clayton & Co., Anderson Clayton Foods, Anheuser-Busch, Incorporated, Apple Computer Inc., A & W Bottling Co. of Seattle, Inc., Bandag Incorporated, Bridgestone (U.S.A.), Inc., Brown & Williamson Tobacco Corp., Brunswick Corporation, Chicopee, The Coca-Cola Company, Darling-Delaware Company, Inc., Down River Forest Products, Inc., Eastman Kodak Company, Ecko Products, Inc., Encyclopaedia Britannica, Inc., Ethicon, Inc., Frito-Lay, Inc., Gaines Foods, Geo. A. Hormel & Co., Giurlani U.S.A., Glaco Corp., Golden Grain Macaroni Co., Inc., Herman Miller, Inc., Hewlett-Packard Company, Janssen Pharmaceutica, J.I. Case Company, Johnson & Johnson Baby Products Company, Johnson & Johnson Dental Products Company, Johnson & Johnson Products, Inc., Kellogg Sales Company, Levi Strauss & Co., Marshall Field & Company, McNeilab, Inc., Monroe Auto

ton that subjected them to the Washington business and occupation tax struck down by this Court in *Tyler Pipe Industries, Inc.* v. *Washington Department of Revenue*, 107 S. Ct. 2810 (1987). Like appellants, amici had filed actions in the Thurston County Superior Court for refunds of business and occupation taxes paid to appellee Department of Revenue, contending that the Washington tax scheme discriminated against interstate commerce in violation of the Commerce Clause, U.S. Const. art. I § 8. Amici's refund actions were held in abeyance, however, pending final resolution of appellants' identical challenges to the tax in *Tyler*.

In that case this Court agreed with the position of appellants and amici that Washington's business and occupation tax violated the Commerce Clause,[2] remanding certain relief issues to the state court. On January 28, 1988, the Washington Supreme Court issued its final response to the *Tyler* remand, denying *any* tax refunds. The court asserted that since it chose to apply *Tyler* purely prospectively, the unconstitutional taxes collected prior to *Tyler* were "constitutionally collected." App. to J.S. at 3a. The present appeal involves the original appellants before this Court in *Tyler*. Just as in that case, resolution of this appeal will also have a direct effect on amici's pending refund actions.

Equipment Company, Monsanto Company, Onan Corporation, Ortho Diagnostic Systems, Ortho Pharmaceutical Corporation, Outboard Marine Corporation, Owens-Corning Fiberglas Corporation, Pacific Coca-Cola Bottling Co., Packaging Corp. of America, Pepsi-Cola Bottling Co. of Everett, Inc., Personal Products Co., Pitman-Moore, Inc., Pizza Hut of America, Inc., Quaker Oats Company, Inc., Sandvik Special Metals Corporation, S&C Electric Co., Stokely-Van Camp, Inc., Surgikos, Inc., Taco Bell Corp., Tektronix, Inc., Triangle Pacific Corp., USX Corporation, Vernell's Fine Candies, Western Bottling Co., Inc., and Woodtape Inc.

This brief is filed with the consent of all parties. Copies of consent letters are on file with the Clerk.

[2] Many of the amici joining in the present brief also participated as amici at the jurisdictional stage and on the merits in *Tyler*.

In addition, quite apart from this particular appeal, amici have a strong interest in protecting interstate commerce from discriminatory state and local taxation, and from state court attempts to utilize jurisdictional and constitutional doctrines in order to permit states to enjoy the fruits of discriminatory taxation. Amici engage in extensive interstate commerce, and are subject to a wide variety of taxes imposed by states and municipalities. This Court's disposition of the present appeal not only will affect amici directly, in light of their pending refund actions, but also will affect state court responses generally to this Court's remands in the area of taxation. Thus, resolution of this appeal will impact upon the future development of state and local taxation practices in a manner that will have long-term significance for interstate commerce and the various activities engaged in by amici.

SUMMARY OF ARGUMENT

The court below, asserting the power to apply this Court's decisions *purely* prospectively, converted this Court's *Tyler* opinion into an advisory one. The decision below cannot be permitted to stand lest all future remands by this Court be construed as invitations, albeit unconstitutional ones, to convert this Court's decisions into advisory opinions.

Constitutional norms of adjudication, housed in Article III of the Constitution and the separation of powers doctrine, demand that this Court's decisions be applied to the actual parties before the Court. The court below emasculated these constitutional norms by denying refunds, based *solely* on its decision to apply *Tyler* purely prospectively, to the very parties who successfully challenged the tax before this Court. Moreover, as this Court recognized last term in *Griffith* v. *Kentucky*, 107 S. Ct. 708 (1987), these same constitutional norms require application of this Court's newly enunciated rules to all cases pending on direct review. *Griffith*'s reasoning is as applicable to the

civil context as to the criminal context in which it was decided, for Article III and the separation of powers doctrine do not vary depending on whether an adjudication is characterized as criminal or civil.

It is not necessary to resolve the constitutional issues lurking in the state court's decision because the state court erred in even invoking the prospective application doctrine. As demonstrated in appellants' Jurisdictional Statement, *Tyler* did not constitute a clear and unforeseeable break with past precedent. Thus, an inquiry into the proper retroactive application of *Tyler* played no legitimate role in the decision below. Because Washington law mandates refunds for taxes collected in violation of the Constitution, the actual *Tyler* litigants, and all parties whose refund actions were pending when *Tyler* was decided, are entitled to tax refunds.

Finally, the approach to Commerce Clause adjudication embraced by the court below cannot be permitted to stand because it contravenes the very purposes of the Clause. If state courts can *sua sponte* prospectively apply this Court's decisions finding state taxes unconstitutional, states will have every incentive to levy such taxes, secure in the knowledge that, with the aid of state courts, they can pocket the windfalls until this Court finds the taxes unconstitutional. Persons subject to the taxes will have little incentive to challenge them, and the taxes will affect the course of commerce between the states until this Court has explicitly overturned each one of them as unconstitutional. Thus, the decision below, with its inappropriate invocation and erroneous application of the prospectivity doctrine, not only violates Article III and the separation of powers doctrine, but also offends the Commerce Clause.

ARGUMENT

I. The Court Below Violated Norms Of Constitutional Adjudication By Applying This Court's *Tyler* Opinion Purely Prospectively.

The Washington Supreme Court interpreted this Court's remand in *Tyler* as a *carte blanche* invitation to convert *Tyler* into an advisory opinion. The state court refused refunds to the very parties who successfully had challenged Washington's unconstitutional tax before this Court, as well as the parties whose cases challenging the tax on the same grounds before the state court were held in abeyance pending final resolution of the underlying issues.[3] The decision below rested *solely* on the state court's misguided invocation of the doctrine of prospective application.

In essence, the state court is attempting to do what this Court itself cannot do—apply a Supreme Court decision *purely prospectively*. This Court is prohibited from rendering advisory opinions or declarations "on rights which may arise in the future." *In re Summers*, 325 U.S. 561, 567 (1945). *See also Federal Communications Comm'n* v. *Pacifica Foundation*, 438 U.S. 726, 734-735 (1978); 12 J. Moore, H. Bendix and B. Ringle, Moore's

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[3] The immediate appellants before this Court include 71 business enterprises that had brought 53 separate tax refund actions before the state court challenging the constitutionality of Washington's business and occupation tax. The Superior Court of Thurston County joined the 53 cases and granted the State's motions for summary judgment, dismissing the taxpayers' actions. On appeal to the Washington Supreme Court, the same 53 cases were consolidated, and three "test cases" were selected for state court review. When the Washington Supreme Court sustained the tax, the 71 appellants brought their challenge to this Court.

In addition to these 53 actions, other cases raising identical challenges to the state tax were filed in the state court prior to this Court's *Tyler* decision. These later cases were held in abeyance, however, pending final resolution of the underlying issues. Amici number among those taxpayers whose cases were thus abeyant.

Federal Practice ¶ 300.02 [2.-2] (2d ed. 1982). By refusing to apply *Tyler's* holding to the actual *Tyler* litigants and all similarly situated parties whose cases were pending when *Tyler* was decided, the state court has effectively converted *Tyler* into an advisory opinion. When viewed through the state court's spectacles, *Tyler* is reduced to a prediction that if Washington attempts to collect the same invalid tax, future taxpayers who challenge the tax will be entitled to refunds.

This Court has repeatedly recognized the impropriety of applying its holdings purely prospectively. In *Stovall* v. *Denno*, 388 U.S. 293 (1967), this Court refused to apply the new constitutional rule enunciated in *United States* v. *Wade*, 388 U.S. 218 (1967), and *Gilbert* v. *California*, 388 U.S. 263 (1967), to petitioners whose cases were pending or finalized the same day *Wade* and *Gilbert* were decided.[4] Speaking through Justice Brennan, this Court acknowledged that, except for future litigants, only Wade and Gilbert would benefit from the newly announced rule, but concluded that such a result was "an unavoidable consequence of the necessity that constitutional adjudications not stand as mere dictum." 388 U.S. at 301.

The assumption that, at a minimum, this Court's holdings must be applied to the immediate litigants is a long-standing and oftentimes unspoken one.[5] In fact, in for-

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[4] Of course, this Court's decision in *Griffith* v. *Kentucky*, *supra*, undercuts *Stovall* to the extent that *Stovall*, in dicta, would permit this Court to deny application of newly announced constitutional rules to parties whose cases were pending on direct review when the new rules were announced. However, *Stovall's* assumption that immediate litigants must enjoy new rules announced in their own cases to effectuate "[s]ound policies of decision-making, rooted in the command of Article III of the Constitution," is still valid today. 388 U.S. at 301. *See, e.g., Griffith.*

[5] Even in cases now invalidated by *Griffith*, in which this Court had stated that newly announced rules for the conduct of criminal

mulating what Chief Justice Rehnquist has termed this Court's "retroactivity jurisprudence," *Griffith*, 107 S. Ct. at 717 (Rehnquist, C.J., dissenting), the Court's concerns have centered not on whether to apply a decision to the immediate litigants, but instead on how far back beyond the immediate litigants a decision must be applied.

As early as 1801 the Supreme Court acknowledged that a change in law must be applied to all cases pending on direct review. *United States* v. *Schooner Peggy*, 5 U.S. (1 Cranch) 103, 110 (1801). When the Court began to formulate its retroactivity doctrine in *Linkletter* v. *Walker*, 381 U.S. 618 (1965), it assumed without question that all new rules were applicable to the immediate litigants *and* all litigants whose cases were pending on direct review. The only balancing or weighing of factors occurred in deciding whether to apply a new rule to a collateral attack of a final judgment. *Id.* at 627.

After *Linkletter*, this Court's retroactivity doctrine "became almost as difficult to follow as the tracks made

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prosecutions were inapplicable to cases pending on direct review, this Court assumed without question that the new rules were applicable to the litigants in the cases in which the new rules were first announced. *See, e.g., Escobedo* v. *Illinois*, 378 U.S. 478 (1964), and *Johnson* v. *New Jersey*, 384 U.S. 719 (1966); *Miranda* v. *Arizona*, 384 U.S. 436 (1966), and *Johnson* v. *New Jersey, supra*; *United States* v. *Wade*, 388 U.S. 218 (1967), and *Stovall* v. *Denno*, 388 U.S. 293 (1967); *Gilbert* v. *California*, 388 U.S. 263 (1967), and *Stovall* v. *Denno, supra; Katz* v. *United States*, 389 U.S. 347 (1967), and *Desist* v. *United States*, 394 U.S. 244 (1969); *Duncan* v. *Louisiana*, 391 U.S. 145 (1968), and *DeStefano* v. *Woods*, 392 U.S. 631 (1968); and *Chimel* v. *California*, 395 U.S. 752 (1969), and *Williams* v. *United States*, 401 U.S. 646 (1971).

Indeed, the only case in which this Court arguably has limited its holding to purely prospective application, *England* v. *Louisiana State Board of Medical Examiners*, 375 U.S. 411 (1964), dealt solely with a pragmatic procedural matter. Thus, in every case involving substantive constitutional issues, this Court has assumed, at a minimum, that its decision must be applied to the immediate litigants.

by a beast of prey in search of its intended victim." *Mackey* v. *United States*, 401 U.S. 667, 676 (1971) (separate opinion of Harlan, J.).[6] However, individual Justices have repeatedly "asserted that, at a minimum, all defendants whose cases were still pending on direct appeal at the time of the law-changing decision should be entitled to invoke the new rule." *United States* v. *Johnson*, 457 U.S. at 545.[7] Last term in *Griffith*, this Court endorsed the views expressed in the past by several individual Justices and held that "a new rule for the conduct of criminal prosecutions is to be applied retroactively to all cases, state or federal, pending on direct review or not yet final, with no exception for cases in which the new rule constitutes a 'clear break' with the past." 107 S. Ct. at 716.

This Court premised its holding in *Griffith* on the belief that "failure to apply a newly declared constitutional rule to criminal cases pending on direct review violates basic norms of constitutional adjudication." *Id.* at 713. However, this Court failed to explain why the

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[6] In his dissent in *Desist* v. *United States*, 394 U.S. at 257, which this Court subsequently endorsed in *United States* v. *Johnson*, 457 U.S. 537, 562 (1982), and *Griffith*, 107 S. Ct. at 713, Justice Harlan described the strange path of this Court's retroactivity doctrine:

> We have held that certain "new" rules are to be applied to all cases then subject to direct review, *Linkletter* v. *Walker*, *supra*; *Tehan* v. *Shott*, 382 U.S. 406 (1966); certain others are to be applied to all those cases in which trials have not yet commenced, *Johnson* v. *New Jersey*, 384 U.S. 719 (1966); certain others are to be applied to all those cases in which the tainted evidence has not yet been introduced at trial, *Fuller* v. *Alaska*, 393 U.S. 80 (1968); and still others are to be applied only to the party involved in the case in which the new rule is announced and to all future cases in which the proscribed official conduct has not yet occurred. *Stovall* v. *Denno*, 388 U.S. 293 (1967); *DeStefano* v. *Woods*, 392 U.S. 631 (1968).

[7] For a list of examples of individual opinions housing this assertion, see *United States* v. *Johnson*, 457 U.S. at 545 n.9.

same "basic norms of constitutional adjudication" do not mandate a like result in the area of civil cases pending on direct review.[8] Indeed, this Court evinced a desire to adopt Justice Harlan's opinions in *Desist* v. *United States*, 394 U.S. at 256 (dissenting opinion), and in *Mackey* v. *United States*, 401 U.S. at 675 (separate opinion), yet in neither opinion did Justice Harlan advocate different treatment for civil cases pending on direct review than for criminal cases pending on direct review. In fact, his opinions suggest the opposite result.[9]

Griffith should be formally extended to civil cases because the constitutional and jurisprudential concerns mandating application of new rules to cases pending on direct review in the criminal area apply with equal force to the civil area. For example, in *Griffith* this Court echoed Justice Harlan's concerns that refusal to apply governing constitutional principles to all cases pending on direct review would be tantamount to legislating, not adjudicating. 107 S. Ct. at 713. The fact that prospective application of this Court's decisions violates the separation of powers doctrine is akin to the fact that it violates Article III's prohibition against advisory opinions. As

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[8] This Court failed to extend its *Griffith* holding to the area of civil retroactivity, terming that area governed by the factors enunciated in *Chevron Oil Co.* v. *Huson*, 404 U.S. 97 (1971). 107 S. Ct. at 713 n.8.

[9] In *Desist* v. *United States*, 394 U.S. at 258, Justice Harlan stated in his dissent, "Indeed, I have concluded that *Linkletter* was right in insisting that all 'new' rules of constitutional law must, at a minimum, be applied to all those cases which are still subject to direct review by this Court at the time the 'new' decision is handed down."

Likewise, in *Mackey* v. *United States*, 401 U.S. at 681, Justice Harlan stated in his separate opinion, "I continue to believe that a proper perception of our duties as a court of law, charged with applying the Constitution to resolve every legal dispute within our jurisdiction on direct review, mandates that we apply the law as it is at the time, not as it once was."

this Court explained in *Flast* v. *Cohen*, 392 U.S. 83, 96 (1968), "the rule against advisory opinions implements the separation of powers prescribed by the Constitution and confines federal courts to the role assigned them by Article III. See *Muskrat* v. *United States*, 219 U.S. 346 (1911) * * *." To the extent that the separation of powers doctrine mandates that new rules announced in the criminal area be applied to all parties whose cases are pending on direct review when the new rules are announced, it must mandate a like result in the civil area. After all, the separation of powers doctrine condemns with equal fervor judicial legislating in civil matters as well as in criminal. Advisory opinions are as constitutionally prohibited in civil cases as they are in criminal.

Moreover, extending *Griffith* to the civil area comports with this Court's

> judicial responsibilities "to do justice to each litigant on the merits of his own case," *Desist* v. *United States*, 394 U.S., at 259 (Harlan, J., dissenting), and to "resolve all cases before us on direct review in light of our best understanding of governing constitutional principles." *Mackey* v. *United States*, 401 U.S., at 679 (separate opinion of Harlan, J.). [*United States* v. *Johnson*, 457 U.S. at 555.]

The same principle, of course, applies to others whose cases are being held in abeyance pending the outcome of certain litigated cases. Thus, in the case at bar it would make little sense to treat the parties who filed timely refund suits before the state court, raising identical constitutional challenges to Washington's business and occupation tax as appellants did, differently than appellants.[10]

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[10] In *Shea* v. *Louisiana*, 470 U.S. 51 (1985), this Court held that *Edwards* v. *Arizona*, 451 U.S. 477 (1981), was applicable to cases pending on direct review in state courts when *Edwards* was decided. Speaking through Justice Blackmun, this Court explained that "there is no difference between the petitioner in *Edwards* and the

Granting refunds to appellants but not to the parties whose identical cases were held in abeyance would not only violate the norms of constitutional adjudication identified in *Griffith* but would also foster perverse and wasteful incentives. Future litigants would feel compelled to race to this Court's doors or to file identical petitions or appeals as other parties have filed, increasing this Court's paperwork and wasting judicial resources.

As acknowledged in *Griffith*, it is impractical for this Court to "hear each case pending on direct review and apply the new rule." 107 S. Ct. at 713. Rather than "'[s]imply fishing one case from the stream of appellate review, using it as a vehicle for pronouncing new constitutional standards, and then permitting a stream of similar cases subsequently to flow by unaffected by that new rule,'" this Court elicits the help of lower courts by commanding them "to apply the new rule retroactively to cases not yet final." *Id.* at 713 (quoting *Mackey* v. *United States*, 401 U.S. at 679 (Harlan, J., separate opinion)).

The court below, however, refused to do this and, unilaterally deciding to apply *Tyler* purely prospectively, failed to apply *Tyler*'s so-called "new" rule to the actual litigants and all other similarly situated parties whose cases were not yet final. If other lower courts were similarly permitted to evade this Court's explicit and implicit instructions on remand, this Court would be faced with the impracticable task, whenever it announced a new rule, of hearing every case pending on direct review in order to effectuate its judicial responsibilities identified in *Griffith*.

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petitioner in the present case." *Id.* at 60. Likewise, there is no difference between the present amici and the present appellants.

II. The Court Below Misconstrued This Court's Remand In *Tyler*.

The state court's interpretation of this Court's remand in *Tyler* leads not only to a result repugnant to the Constitution, but to one that is unreasonable as well. This Court granted the State a remand because of the possible validity of the State's argument that "the taxes at issue were assessed prior to * * * *Armco* and the holding in that case was not clearly foreshadowed by earlier opinions." 107 S. Ct. at 2822. However, on remand the state court did not consider whether *Armco Inc.* v. *Hardesty*, 467 U.S. 638 (1984), was foreseeable or whether under *Chevron Oil Co.* v. *Huson*, 404 U.S. 97 (1971), taxes collected prior to *Armco* were exempt from the State's refund laws. Instead, the state court erroneously considered whether *Tyler* itself was foreseeable and whether any taxes collected prior to *Tyler* were exempt from the State's refund laws. This Court had already determined, however, not only that *Tyler* was foreseeable but that it was in fact *mandated* by *Armco*. *Tyler*, 107 S. Ct. at 2817. This Court's remand was certainly not an invitation for the state court to substitute its judgment on the foreseeability of *Tyler* for this Court's judgment.

In addition, the court below ignored this Court's guidance with respect to the appropriate factors to consider on remand. This Court found support for its decision to remand *Tyler* in *Bacchus Imports, Ltd.* v. *Dias*, 468 U.S. 263 (1984), and *Williams* v. *Vermont*, 472 U.S. 14 (1985).[11] In *Bacchus Imports* this Court held that Ha-

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[11] In considering whether a remand on the relief issue was appropriate in *Tyler*, this Court also noted *Hooper* v. *Bernalillo County Assessor*, 472 U.S. 612 (1985). In *Hooper*, the Court held that New Mexico's residence requirement in its statute exempting Vietnam veterans from a portion of the State's property tax violated the Equal Protection Clause. The Court remanded the case, however, to permit the state court to ascertain whether the unconstitutional portion was severable, entitling all qualified current

waii's tax exemption from its liquor excise tax for okolehao and fruit wines violated the Commerce Clause. The Court remanded the case, however, to determine whether the petitioners merited the refunds they sought.[12] The remand was based on the fact that the record was incomplete on the refund issue and on this Court's recognition that federal constitutional issues could be obviated by state law. "It may be, for example, that given an unconstitutional discrimination, a full refund is mandated by state law." *Id.* at 277 n.14.

Likewise, the same basic concerns prompted this Court's remand in *Williams* v. *Vermont*, in which the Court held that on its face Vermont's statute, providing a residency restriction on the availability of a sales tax credit for use tax paid to another state, violated the Equal Protection Clause. However, the record did not establish whether the statute actually operated in a discriminatory manner. For this reason and "in light of the fact that the action was dismissed on the pleadings, and given the possible relevance of state law, see *Bacchus Imports, Ltd.* v. *Dias*, 468 U.S. 263, 277 (1984)," this Court did not resolve the issue of appropriate remedies. *Id.* at 28.

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resident veterans to the tax exemption, or whether the entire veterans' tax exemption statute had to fall.

[12] In *Bacchus Imports*, the State argued that the petitioners were "not entitled to refunds since they did not bear the economic incidence of the tax but passed it on as a separate addition to the price that their customers were legally obligated to pay within a certain time." 468 U.S. at 276-277. The petitioners countered that they were entitled to refunds because they were legally obligated to pay the tax, regardless of whether their customers paid their bills and, in fact, the discriminatory tax "worked a competitive injury on their business." *Id.* at 277. In addition, they argued that the Commerce Clause dictates refunds for taxes collected in violation of the Clause. This Court, however, did not resolve the refund dispute, in part because these very issues "were not addressed by the state courts." *Id.*

This Court's primary concerns in remanding *Tyler* (in reliance on *Bacchus* and *Williams*) were thus (a) the adequacy of the record to determine refunds and (b) the possibility that state law might resolve the refund issue and thereby eliminate the need for this Court to decide the federal constitutional aspects of that issue. 107 S. Ct. at 2822-23. The court below considered the first of this Court's concerns not implicated in this case, and sought to extricate itself from the other primary concern. Although concluding that state law demanded refunds for taxes paid in violation of the state or federal Constitution, App. to J.S. at 2a-3a, the state court attempted to evade state law by engaging in the unsupported and novel fiction that if it chose to apply this Court's decision in *Tyler* purely prospectively, taxes collected prior to *Tyler* were "constitutionally collected." App. to J.S. at 3a.

Certainly this Court's remand did not explicitly or implicitly invite the state court to apply *Tyler* purely prospectively. Moreover, as demonstrated above, the state court violated Aricle III of the Constitution by effectively converting this Court's decision into an advisory opinion and, in the process, violated the separation of powers doctrine by applying the decision as a legislative pronouncement rather than as an adjudication on the merits. The state court certainly violated "basic norms of constitutional adjudication," which demand that this Court's decisions be applied to the immediate litigants and all parties whose cases are pending on direct review. *Griffith*, 107 S. Ct. at 713.

III. The Court Below Erred In Even Invoking The Doctrine Of Prospective Application And, In the Process, Offended The Commerce Clause.

This Court's retroactivity jurisprudence is at issue only because the state court erroneously invoked the doctrine of prospective application. This doctrine should have played no role whatsoever in the state court's decision.

The issue of prospective application of a federal court decision is only relevant if that decision announces a new and unanticipated rule of law. *See, e.g., United States* v. *Johnson*, 457 U.S. at 549; *Chevron Oil Co.*, 404 U.S. at 106; *Hanover Shoe, Inc.* v. *United Shoe Machinery Corp.*, 392 U.S. 481, 496 (1968). This requirement is not to be taken lightly. For the prospective application doctrine to be applicable, the new shift in doctrine must "constitute an entirely new rule which in effect replaced an older one." *Id.* at 498.

As appellants demonstrated in their Jurisdictional Statement, *Tyler* cannot be read as "a sharp break in the line of earlier authority or an avulsive change which caused the current of the law thereafter to flow between new banks." *Hanover Shoe*, 392 U.S. at 499. In fact, this Court explicitly concluded that *Armco required* the result in *Tyler*. *Tyler*, 107 S. Ct. at 2817. Certainly this Court did not construe its *Tyler* opinion as announcing a new and unanticipated break with past precedent. Nor did this Court invite the state court to consider this issue; this Court remanded on the State's argument that *Armco*, not *Tyler*, may have been unforeseeable and that refunds for taxes collected prior to *Armco*, not *Tyler*, may not be mandated. *Tyler*, 107 S. Ct. at 2822.

In essence, this Court is confronted with a state court that erroneously invoked the doctrine of prospective application *and* erroneously interpreted the contours of that doctrine. Not only did the state court's decision violate constitutional norms of adjudication but it also offended the Constitution by threatening the goals of the Commerce Clause.

As explained in appellants' Jurisdictional Statement, the state court's application of the *Chevron* factors, if permitted to stand, would enable all state courts to discriminate against interstate commerce risk-free. States would have an incentive to impose taxes in violation of the Commerce Clause, secure in the knowledge that if

this Court one day finds the state's tax unconstitutional, the state court need only enunciate a formula (that the state court itself did not foresee this Court's decision) to retain the fruits of its unconstitutional tax.[13] Knowledge of this possibility could certainly chill interstate trade, thus undermining the central purpose of the Commerce Clause—to create an area of free trade among the states. *American Trucking Ass'ns* v. *Scheiner*, 107 S. Ct. 2829, 2839 (1987). Business entities might avoid transacting business in states imposing such taxes, preferring to wait until this Court explicitly strikes the taxes down, rather than pay the taxes until this Court overturns them, with no realistic hope of refunds.

Moreover, interstate commerce concerns demand that *Tyler* be applied to all parties whose cases challenging Washington's business and occupation tax were pending when *Tyler* was decided. Free trade among the states is chilled if entities believe that states can ignore their own refund statutes and refuse refunds to all challengers or to all challengers save the one lucky challenger who managed to win this Court's ear. In addition, if state courts can ignore their refund statutes and apply this Court's pronouncements on unconstitutional taxes solely to the actual litigants before this Court, states have the same risk-free incentive to impose taxes in violation of the Commerce Clause. The state court could pick as a test case the one challenge with the smallest refund at stake, and thus ensure that even if that challenger successfully presented its case to this Court, the state need only pay one small refund, retaining the bulk of its unconstitutional windfall.

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[13] The court below rested its finding that "the *Tyler* decision established a new principle of law overruling past precedent on which litigants may have relied," and thus was amenable to prospective application, on the bootstrap assertion that it "did not read *Armco* as foreshadowing the result in *Tyler*." App. to J.S. at 4a, 5a.

The decision below cannot be permitted to stand. It effectively undermines the goals of the Commerce Clause. It also enables lower courts to do what this Court itself cannot do—convert this Court's decisions into advisory opinions and, in the process, violate Article III and the separation of powers doctrine. In addition, the state court's decision to deny refunds to appellants *and* the parties whose cases were pending when *Tyler* was decided exhibits an utter disregard for this Court's constitutional norms of adjudication. The potential damage to interstate commerce and our constitutional system, should the decision below stand, far outweighs the value of any refunds now at issue.

CONCLUSION

For the foregoing reasons, and those in the Jurisdictional Statement, this Court should note probable jurisdiction and reverse the decision below.

Respectfully submitted,

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No. 87-1629

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1987

NATIONAL CAN CORPORATION, et al.,
Appellants,

VS.

STATE OF WASHINGTON DEPARTMENT OF REVENUE,
Appellee.

On Appeal from the Supreme Court of Washington

BRIEF AMICUS OF THE INSTITUTE OF PROPERTY TAXATION IN SUPPORT OF APPELLANTS' JURISDICTIONAL STATEMENT

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BRIEF AMICUS OF THE INSTITUTE OF PROPERTY TAXATION IN SUPPORT OF APPELLANTS' JURISDICTIONAL STATEMENT

PRELIMINARY STATEMENT

Attached hereto and marked Exhibit A is the written consent of the Appellant, National Can Corporation, consenting to the filing of an *amicus* brief by the Institute of Property Taxation in support of the Appellants' Jurisdictional Statement. Attached hereto and marked Exhibit B is the consent of the Attorney General of the State of Washington, on behalf of the Appellee, State of Washington Department of Revenue, consenting to the filing of a brief *amicus curiae* in support of National Can Corporation's appeal to the United States Supreme Court.

INTEREST OF THE AMICUS CURIAE

The Institute of Property Taxation (the "Institute") maintains its offices at 122 C Street, N.W., Suite 200, Washington, D.C. 20001. The Institute is a not-for-profit corporation organized under the laws of the District of Columbia. It is dedicated to fostering and promoting uniform and equitable administration of both *ad valorem,* sales and use taxes, and other forms of state and local taxation, excepting income taxes. The Institute was founded in 1976 as a committee of the Council of State Chambers of Commerce, and was separately incorporated in 1985. The Institute is dedicated to promoting the uniform and equitable administration of state and local taxation through promotion of education and professionalism of its members, promotion of the collection and exchange of useful information and assistance among its members, cooperation with governmental bodies in improving state and local tax administration (other than income tax administration), and establishment and promotion of high standards of competence and efficiency in tax management. The goals of the institute are to be reached in part by review and dissemination of information, and in part by the sponsorship of educational functions and the award of professional designations in the field of property and sales and use taxes.

The Institute, in addition to its bylaws, has a written code of ethics whereby each member agrees that he or she shall be professional and objective in performing responsibilities with government, the public, and fellow members; shall assume an obligation to develop the sound administration of property and state and local tax (other than income tax) law and the adoption of equitable tax legislation; shall conduct himself or herself with due regard for the interests of society, as well as those of his

or her company and its employees; shall endeavor to establish valuations and all other tax liabilities in accordance with acceptable practices and standards; and shall employ outside representatives upon the basis of technical competence, having due regard for the highest standards of professional ethics.

The decision of the Supreme Court of Washington in *National Can Corporation, et al., Appellants v. The Department of Revenue*, filed January 28, 1988, is so far-reaching in its scope and involves such a radical interpretation of this Court's decsion in *Tyler Pipe Co. v. Washington Dept. of Revenue*, 483 U.S. ____, 107 S.Ct. 2810, 97 L.Ed.2d 199 (1987), that the Institute, through this brief, respectfully requests that this Court note jurisdiction to resolve the questions raised by Appellants.

OPINIONS BELOW

The opinion of the Washington Supreme Court is set forth in Appendix A of the Jurisdictional Statement of the Appellants, National Can Corporation, et al., and is reported at 109 Wash.2d 878, 749 P.2d 1286 (1988).

CONSTITUTIONAL AND STATUTORY PROVISIONS

While there are matters involving the Revised Code of Washington, which is reproduced in pertinent part in Appendix C of the Appellants' Jurisdictional Statement, the Commerce Clause (Art. I, § 8, cl. 3), the necessity that the courts decide "cases" and "controversies" (Art. III, § 2), and the Supremacy Clause (Art. VI) of the United States Constitution are the matters which concern Amicus and are set forth herein in Exhibit C.

STATEMENT OF THE CASE

Following determination by this Court in *Tyler Pipe Co. v. Washington Dept. of Revenue*, 483 U.S. ____, 107 S.Ct. 2810, 97 L.Ed.2d 199 (June 23, 1987), the Washington Supreme Court made a determination that, although the statutes relating to the application of Washington's Business and Occupation Tax may have been unconstitutional and although the Washington Supreme Court had stated that if a tax were in violation of the Due Process or Commerce Clause, it would be in violation of the local tax refund statute, an additional basic inquiry must be made. That inquiry was whether or not the *Tyler* decision, *supra*, would be applied prospectively only, so that refunds would be unavailable to the taxpayers involved in the *National Can Corporation* cases. The action had originally been brought for refund of specified business and occupation taxes paid to the State of Washington.

This Court, in *Tyler*, vacated the judgment of the Washington Supreme Court denying recovery, concluding that the reasons for invalidating the West Virginia tax in *Armco, Inc. v. Hardesty*, 467 U.S. 638, 104 S.Ct. 2620, 81 L.Ed.2d 540 (1984) also applied to the tax challenged in *Tyler*. This Court observed that the *Armco* court had endorsed the dissent of an earlier case involving Washington State's business and occupation tax, *General Motors Corp. v. Washington*, 377 U.S. 436 at 459, 84 S.Ct. 1564, 12 L.Ed.2d 430 (1964). *Tyler*, 107 S.Ct. at 2816.

This Court, in noting Washington's plea for nonretroactivity (on the grounds that the taxes at issue were assessed prior to the opinion in *Armco*) and that the holding in *Armco* was not clearly foreshadowed by earlier opinions, because of the potential application of state law and the possible need for an expanded record, remanded

the matter to the Washington court to address the refund issue in the first instance. *Tyler* at 2822-23.

However, the Washington Supreme Court, on remand, found no need for an expanded record, conceding that the Washington statutory law mandates a refund of taxes unconstitutionally collected. Notwithstanding this, the court denied all refunds for claims prior to June 23, 1987, the effective date of the *Tyler Pipe* decision. It did not limit its consideration of prospective application to taxes collected before the *Armco* decision. It based its decision upon the thesis that when *Tyler* was decided and held to be facially discriminatory, a new rule of law had been adopted, particularly in light of the fact that, to the extent that the U.S. Supreme Court's conclusion in *Tyler* was inconsistent with *General Motors Corp. v. Washington, supra, General Motors* was overruled. The Washington Supreme Court also observed that it had held the "internal consistency" rule not applicable to a determination of discrimination in a gross receipts tax case. Therefore, when *Tyler* was decided and held to be facially discriminatory, a new rule of law had been adopted, and the *Armco* court's reference to the dissent of Justices Goldberg, White and Stewart in *General Motors,* without overruling the other cases on which the Washington Supreme Court relied, did not clearly indicate that the Washington tax statutes involved in *Tyler* were unconstitutional. Furthermore, the court stated, it could not be expected that *Armco* clearly foreshadowed *Tyler.*

The Washington Supreme Court came to its conclusion notwithstanding a letter from the Department of Revenue to the Governor of Washington (just after *Armco* was decided), that Washington's multiple-activities exemption was unconstitutional. The Court said such a state-

ment would not be binding on either the State or the court.

Having decided that *Tyler* established a new principle of law, the Washington Supreme Court then proceeded to look at the purpose of the Commerce Clause, to determine if it would be furthered or retarded by retroactive application. It concluded that the award of such taxes to the plaintiffs would be in the nature of punitive award for the misconstruing of the business and occupation tax by the Washington Supreme Court. The court stated that whatever chill was imposed upon interstate trade was in the past, and the legislature had enacted law to attempt to comport with the new Commerce Clause taxation rules announced in *Tyler*.

The Washington Supreme Court further stated that the fact that, in argument seeking an injunction, the State itself had argued that taxpayers had an adequate remedy at law in the form of a possible refund, did not mean that the State is foreclosed from arguing that such a refund is not (under applicable preexisting law) now owed to the taxpayers.

THIS COURT SHOULD FIND THAT IT HAS JURISDICTION TO HEAR THE APPEAL

A. The Decision of the Washington Supreme Court Following Remand Makes Nullities of the Decisions of this Court Which Protect Interstate Commerce from State Tax Discrimination.

If the rule against discrimination is to have any validity, the states should not be in a position to be able to keep what have, since *Armco* at least, been the fruits of their discrimination. In essence, the action of the Washington Supreme Court in this case strikes a fatal blow to any taxpayer who has suffered the discrimination result-

ing from legislation of the type set aside by this Court. In effect, a taxpayer who undertakes the litigation and incurs all of the massive expenses accompanying such litigation will receive no refund for the unconstitutionally collected taxes. Under such a circumstance, as set forth on page 16 of the Appellants' Jurisdictional Statement, Washington State has no equity. The State consciously persisted in defending the statutes, which were unconstitutional and were set aside, and in obtaining the fruits of its discrimination even though, since *Armco,* the judicial handwriting clearly had been on the wall. Indeed the State of Washington participated as amicus curiae in *Armco.* (*Armco, supra,* p. 645) While a court of equity may fashion remedies in tax cases, that right does not permit the removal of the benefits of the successful litigation.

However, unlike *Chevron Oil Co. v. Huson,* 404 U.S. 97, 107; 30 L.Ed.2d 296, 92 S.Ct. 349 (1971), there simply is no inequity imposed by retroactive application. In *Chevron, supra,* a personal injury case, it was held that the Louisiana statute of limitations should not be applied because it would deny respondent of any remedy at all. *Chevron, supra,* at pp. 106-108. But to assert that this applies to taxation, where, in every case, as a matter of equity, the taxes must be paid before they can be contested, where it has been deemed and stated by counsel for the State that an adequate remedy exists, and where Washington had participated in the *Armco* case as amicus makes it inequitable to deny recovery. In short, the decision in *Tyler* was quite foreseeable.

This is particularly true where the record discloses no fact which makes the refund inequitable (indeed, where no additional record had been made). In short, the State could have set up a reserve to refund the taxes, being on

notice of the actions that were being brought, and could have avoided bootstrapping itself into a hardship situation. The end result of the action of the Washington Supreme Court will be that there will always be determined a "new principle" where the tax administrator or the state court has failed to understand a decision of this Court involving the Commerce Clause or any other type of fundamental federal constitutional principle. Moreover, it is respectfully submitted that the letter written by the Washington tax administrator to the Governor of the State of Washington was, in essence, a plea to set aside the tax moneys collected and not to spend them, pending the outcome of the decisions which were to follow *Armco.* The end result of the affirmance by the Washington Supreme Court following the remand of *Tyler* will be to make it profitable to discriminate and to put a chill on interstate commerce, because the actions will always be in the "past." The position of the Washington Supreme Court following remand in light of its decision in *Columbia Steel Co. v. State,* 30 Wash.2d 658, 662-664, 192 P.2d 976 (1948), set forth in footnote 8 of *Armco* at p. 645, makes one doubtful of the assertion that *Tyler* involved a new unforeseen shift in the law. Washington's amicus position in *Armco* also throws doubt on such an assertion.

It is also respectfully submitted that if the tax impact upon the State of Washington was so great should the refunds have been granted, then the Washington court should have taken evidence in order to determine the impact of the tax refunds and to have worked out an appropriate remedy by way of credits and offsets. Perhaps payment could have been made on an installment basis which would have been in the nature of the issuance of bonds or notes payable over a period of time and bearing appropriate interest, but which would not have further deprived the plaintiffs of the right to receive a

refund, nor further exacerbated the discrimination inherent in the original statutes.

B. The Decision of the Washington Supreme Court Makes the Decision of the United States Supreme Court Merely Advisory.

If the courts of a local jurisdiction must find that, before a tax refund can be given, the local court or tax administrator must have known that the United States Supreme Court would be articulating a new principle of law before a refund would be required, then the decision of this Court in *Tyler* becomes merely advisory. Such a rule would apply not only to the "facial discrimination" basis of *Tyler,* but to every type of a decision, not necessarily involving state and local taxation alone, no matter on what basis the decision was grounded.

For instance, if the statute would take away the substantive due process rights of a taxpayer, or if it involved a clear denial of the equal protection of the laws by selecting a taxpayer without a reasonable basis for classification, or if no procedural due process remedy were available under the statute, then the line of cases decided by this Court from which a legislator, a court or a taxpayer could have determined that there would be a violation of any of the fundamental rights, would nevertheless preclude a taxpayer from receiving a refund because the local authorities "did not clearly" have an indication that the local statute was unconstitutional. In short, the impact of the Washington decision makes the decision in *Tyler merely an advisory decision, in violation of Art. III and Art. VI of the United States Constitution.*

The Washington decision squarely is opposed to the decision of this Court in *Simpson v. Union Oil Co.,* 396 U.S. 13, 15, 24 L.Ed.2d 13, 90 S.Ct. 30 (1969). There the

Supreme Court following remand, in a matter involving public policy refused to apply retroactivity to the parties. In *Simpson v. Union Oil,* 377 U.S. 13, 12 L.Ed.2d 98, 81 S.Ct. 1051 (1964) the Supreme Court had held that a "consignment agreement" for the sale of gasoline required by the defendant of lessees of its retail outlets violated the Sherman Act. The case was remanded for hearing on other issues and for a determination of damages. The Court had stated in the last sentence of its opinion, "We reserve the question whether, when all the facts are known, there may be any equities that would warrant only prospective application in damage suits of the rule governing price-fixing by the 'consignment' device which we announce today." *Simpson v. Union Oil Co.,* 377 U.S. 13, 24-25. Upon remand, the district court held that retroactive application would be unfair and that the rule should be given prospective effect only. It set aside as excessive a jury verdict awarding the plaintiff damages. The Court of Appeals for the Ninth Circuit affirmed (411 F.2d 897). This Court granted *certiorari* on the issue of whether its decision should be given mere prospective effect, and reversed the lower court, stating, at page 14 of 396 U.S.:

> "The question we reserved was not an invitation to deny the fruits of successful litigation to this petitioner. Congress has determined the causes of action that arise from antitrust violations; and there has been an adjudication that a cause of action against respondent has been established. Formulation of a rule of law in an Article III case or controversy which is prospective as to the parties involved in the immediate litigation would be most unusual, especially where the rule announced was not innovative. . . ."

Since the rule of *Armco* incorporated into *Tyler* was not innovative, and since there was no real factual determination of the equities, and since the Appellee clearly, together with the other parties set forth in Appendix D of Appellants' Jurisdictional Statement, was a party to the litigation, the net effect of the Washington decision is to make this Court's decision an advisory decision only, and the actions of the Appellants' useless acts. Of greater importance, however, is the impact upon tax litigation generally. The decision of the Supreme Court of Washington is an invitation for taxing agencies to make the decisions in *Armco* and *Tyler* merely advisory and of no effect. That the States are adopting prospective application in tax cases following decisions by this Court on the basis of discrimination against interstate commerce is apparent from the State actions which occurred in the following cases: *American Trucking Association, Inc. v. Gray*, 483 U.S. ____, 108 S.Ct. 2, 97 L.Ed.2d 790 (1987); *American Trucking Association v. Gray*, No. 85-101, 1988 Westlaw 21852 (Ark., Mar. 14, 1988). The Arkansas court deemed the State not to be on notice of the decision of this Court in *American Trucking Association, Inc. v. Scheiner*, 483 U.S. ____, 107 S.Ct. 3252, 97 L.Ed.2d 226 (1987).

CONCLUSION

For the reasons expressed herein, this Court should note probable jurisdiction. The proceedings of the Washington Supreme Court following remand were inconsistent with the opinion of this Court in *Tyler*. A hearing is required in order that this Court determine that a remedy be fashioned pursuant to the holdings of *Armco* and *Tyler* in order that the provisions of Article I, Section 8, Article III and Article VI of the Constitution remain meaningful.

Respectfully submitted,

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Los Angeles, California 90017
(213) 624-9201

Counsel for Amicus
Institute of Property Taxation

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EXHIBIT A

BOGLE & GATES

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06963/31110

April 7, 1988

Mark Ancel, Esq.
Baker & Ancel
626 Wilshire Boulevard, 7th Floor
Los Angeles, CA 90017

Re: National Can Corporation, et al. v. Washington Department of Revenue, 109 Wn.2d 878 (1988)

Dear Mr. Ancel:

This is to confirm that the appellants, National Can Corporation, et al., will appeal the above entitled case to the United States Supreme Court. On behalf of such appellants we hereby consent to the filing of an amicus brief by the Property Tax Institute in support of the appellants' jurisdictional statement.

We have contacted William Collins, Assistant Attorney General for the State of Washington, to ask if the State will likewise consent. Mr. Collins anticipates that it will but asks that you confirm your request in writing to him at the address shown below. Thank you.

Very truly yours,

BOGLE & GATES

John T. Piper, P.S.

cc: William B. Collins, Esq.
Assistant Attorney General
State of Washington
Department of Revenue
415 General Administrataion Bldg.
Olympia, WA 98504

EXHIBIT B

Ken Eikenberry
ATTORNEY GENERAL OF WASHINGTON
7th FLOOR, HIGHWAYS-LICENSES BUILDING • OLYMPIA, WASHINGTON 98504-8071

April 13, 1988

RECEIVED APR 15 1988

Mark G. Ancel
BAKER & ANCEL
626 Wilshire Boulevard, Seventh Floor
Los Angeles CA 90017

Re: National Can Corporation, et al. v. State of Washington, Department of Revenue
U. S. Supreme Court Docket No. 87-1629

Dear Mr. Ancel:

This is in reply to your letter dated April 11, 1988 requesting consent to file a brief as amicus curiae, in support of National Can Corporation's appeal in the above-referenced case to the United States Supreme Court.

On behalf of the State of Washington, Department of Revenue, I consent to the filing of a brief in support of National Can's Jurisdictional Statement by the Institute of Property Taxation, pursuant to Rule 36.1 of the Rules of the Supreme Court of the United States.

Very truly yours,

William B. Collins
Assistant Attorney General
(206) 753-5528

WBC:lw

EXHIBIT C

EXHIBIT C

CONSTITUTIONAL PROVISIONS

United States Constitution, Article I:

> Section 8. The Congress shall have Power . . . ;
>
> To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes; . . .

* * *

United States Constitution, Article III:

> Section 1. The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish. . . .
>
> Section 2. The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority; — to all Cases affecting Ambassadors, other public Ministers and Consuls; — to all Cases of admiralty and maritime Jurisdiction; — to Controversies to which the United States shall be a Party; — to Controversies between two or more States; — between a State and Citizens of another State; — between citizens of different states; — between citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

* * *

United States Constitution, Article VI:

* * *

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

PROOF OF SERVICE BY MAIL

I am a citizen of the United States and a resident of the City and County of Los Angeles; I am over the age of eighteen years and not a party to the within action; my business address is: 1706 Maple Avenue, Los Angeles, California.

On April 28, 1988, I served the within; Amicus Brief in re: "National Can Corporation vs. State of Washington Department of Revenue" in the United States Supreme Court, October Term 1987, No. 87-1629;

On the Parties in said action, by placing Three copies thereof enclosed in a sealed envelope with postage fully prepaid, in the United States post office mail box at Los Angeles, California, addressed as follows:

D. Michael Young, Esq.
John T. Piper, Esq.
Christopher N. Weiss, Esq.
Bogle & Gates
The Bank of California Center, Suite 2000
900 Fourth Avenue
Seattle, Washington 98164
Attorneys for Appellants
National Can Corporation, et al.

William B. Collins, Esq.
Assistant Attorney General
Attorney General of Washington
7th Floor, Highways-Licenses Building
Olympia, Washington 98504-8071
Attorneys for Appellee State of Washington
Department of Revenue

All Parties required to be served have been served.

I certify under penalty of perjury, that the foregoing is true and correct.

Executed on April 28, 1988, at Los Angeles, California

Ce Ce Medina

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No. 8

IN

Supreme Court o

OCTOBER T

NATIONAL CAN C

STATE OF WASHINGTON I

On Appeal from the Supr

BRIEF OF THE COMMITTE
THE COUNCIL OF STATE
AS *AMICUS CURIAE* IN S
JURISDICTION

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* Counsel of Record

WILSON - EPES PRINTING CO., INC. -

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the United States
ERM, 1987

RPORATION, *et al.*,
Appellants,

EPARTMENT OF REVENUE,
Appellee.

me Court of Washington

E ON STATE TAXATION OF
HAMBERS OF COMMERCE
PPORT OF APPELLANTS'
L STATEMENT

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

No. 87-1629

NATIONAL CAN CORPORATION, *et al.*,
Appellants,

v.

STATE OF WASHINGTON DEPARTMENT OF REVENUE,
Appellee.

On Appeal from the Supreme Court of Washington

BRIEF OF THE COMMITTEE ON STATE TAXATION OF THE COUNCIL OF STATE CHAMBERS OF COMMERCE AS *AMICUS CURIAE* IN SUPPORT OF APPELLANTS' JURISDICTIONAL STATEMENT

INTRODUCTORY STATEMENT

This brief is submitted by the Committee on State Taxation of the Council of State Chambers of Commerce as *amicus curiae* in support of Appellants' Jurisdictional Statement in the above-captioned case. Written consents of the Appellants and the Appellee have been obtained and are attached herewith.

INTEREST OF *AMICUS CURIAE*

The Council of State Chambers of Commerce (COUNCIL), organized in 1932, consists of 40 Chambers of Commerce. The Committee on State Taxation (COST),

one of the three advisory committees of the COUNCIL, consists of 269 corporate members which conduct a substantial portion of the interstate commerce of United States taxpayers. One of COST's principal activities has been to work with the States and others toward developing fair and equitable standards of state taxation. Member companies of COST are representative of that part of the Nation's business sector which is most directly affected by state taxation of interstate operations. COST has a vital interest, therefore, in cases such as the instant case in which Washington seeks to give "prospective only" effect to this Court's decision in *Tyler Pipe Company v. Washington Department of Revenue*, 107 S.Ct. 2810 (1987), invalidating the multiple activities exemption of the Washington business and occupation tax as unconstitutionally discriminatory under the Commerce Clause.

During the past five years, State after State has been taking a backdoor, prospective-only approach to adverse large-dollar state tax test cases. If a State wins, all companies lose. If a State loses, it declares that (i) the decision established a "new principle of law" under *Chevron Oil Co. v. Huson*, 404 U.S. 97 (1971); (ii) therefore, the decision should receive "prospective only" application; and (iii) either *all* companies or all companies, other than the victorious taxpayer, lose.

In *Chevron Oil*, this Court set forth a three-prong test for determining whether prospective effect should be given a decision: (1) The decision must establish a new principle of law, either by overruling clear past precedent on which litigants may have relied or deciding an issue of first impression whose resolution was not clearly foreseen; (2) The court must look to the prior history of the rule in question, its purpose and effect, and whether application to similarly-situated taxpayers for open years will further or retard its operation; *and* (3) The court must consider potential inequities and avoid injustice and

hardship. The "new principle of law" standard is being violated by many state departments of revenue and many state courts which ignore clearly controlling existing precedent and otherwise justify prospective application of this Court's decisions of unconstitutional state taxation.

The case at hand is particularly egregious. The Washington Supreme Court, in its ruling on remand that *Tyler Pipe* established a "new principle of law", *National Can Corp. v. Washington Department of Revenue*, 749 P.2d 1286 (Wash. 1988), disregarded this Court's heavy reliance on *Armco, Inc. v. Hardesty*, 467 U.S. 638 (1984) and earlier cases in reaching the conclusion that "Washington's B&O tax is . . . inconsistent with our precedents". 107 S. Ct. at 2820. The principle that prohibits discrimination against interstate commerce is far from "new". *See Boston Stock Exchange v. State Tax Commission*, 429 U.S. 318 (1977). Nevertheless, in its holding of "pure prospective application" from June 23, 1987, the date of the *Tyler Pipe* decision, the court below denied the fruits of victory to all taxpayers, including National Can and the other interstate corporate taxpayers before this Court in *Tyler Pipe*. In so holding, the Washington Supreme Court determined that "for purposes of applying the refund statutes it is as if the taxes collected pre-*Tyler* were constitutionally collected." 749 P.2d at 1287. Thus, the Washington Supreme Court has held that the State can (1) retain all discriminatory taxes assessed and collected prior to June 23, 1987 and (2) continue to collect unpaid, unconstitutional proposed assessments for periods prior to June 23, 1987.

A substantial number of COST members are adversely affected by the January 28, 1988 ruling of the court below. If that ruling is permitted to stand, the finding of unconstitutional state taxation by this Court in *Tyler Pipe* will become meaningless. The State will contend that its 1985 and 1987 "quick fixes" solved the constitutional defect. In response to this Court's decision in

Armco, the Washington legislature on April 30, 1985 amended Wash. Rev. Code § 82.04.440, the provision containing the multiple activities exemption for wholly local intrastate manufacturer-sellers, to provide Washington manufacturers selling outside the State a manufacturing B&O tax credit for gross receipts taxes paid to other jurisdictions. This credit mechanism was to be applicable retroactively and prospectively from date of enactment but only if Washington's B&O tax multiple activities exemption was found to result in unconstitutional discrimination against interstate or foreign commerce. Laws of 1985, ch. 190. Following this Court's decision in *Tyler Pipe*, legislation was enacted on August 12, 1987 to allow out-of-state manufacturers selling into Washington a similar credit. Laws of 1987, 2d Ex. Sess., ch. 3. In light of the Washington Supreme Court's prospective holding of *Tyler Pipe*, all credits become effective June 1, 1987. ETB 537.04.19301, Wash. St. Dept. Rev. (Mar. 11, 1988). This alleged cure could then be challenged and declared unconstitutional by this Court in, say, 1993. The State will then declare that the 1988 holding involves a "new principle of law" which requires prospective application and the cycle will begin again.

The larger problem is the increasing number of jurisdictions which, during the past five years, have determined that judicial decisions invalidating unconstitutional state taxes should be applied prospectively. In *First of McAlester Corp. v. Oklahoma Tax Commission*, 709 P.2d 1026 (Okla. 1985), the Oklahoma Supreme Court applied its decision invalidating the state bank tax as unconstitutional under *Memphis Bank & Trust Co. v. Garner*, 459 U.S. 392 (1983), prospectively only from January 24, 1983, the date of this Court's decision. In another instance where an unconstitutional taxing scheme was found under this Court's *Memphis Bank* decision, the state and the city differ in their application of the state court of appeals decision. The City of New York has

taken the position that the decision in *Matter of Forbes, Inc. v. Department of Finance*, 487 N.E. 2d 252 (N.Y. Ct. App. 1985), invalidating the City's treatment of federal government obligations for general corporation tax purposes as discriminatory and unconstitutional, is to be applied prospectively from November 19, 1985, the date of the New York Court of Appeals decision. The State of New York, in a commendable manner, allowed refund claims for all open years.

In *Ashland Oil, Inc. v. Rose*, 350 S.E. 2d 531 (W.V. 1986), *appeal dismissed*, 107 S. Ct. 1949 (1987), the West Virginia Supreme Judicial Court has applied prospectively this Court's decision in *Armco* to all taxpayers other than Armco. This Court dismissed Ashland's appeal of this decision of prospectivity for want of a final judgment, apparently to allow the state courts to rule on the nexus issue.

The Commonwealth of Pennsylvania is seeking prospective application of this Court's decision in *American Trucking Associations, Inc. v. Scheiner*, 107 S.Ct. 2829 (1987), invalidating the state's highway flat taxes as unconstitutionally discriminatory under the Commerce Clause. *See* 107 S.Ct. at 2847. Other States are applying the prospectivity doctrine to avoid refunds of similar flat taxes found unconstitutional under the *Scheiner* decision. *See American Trucking Associations, Inc. v. Gray*, No. 85-101 (Ark. Mar. 14, 1988) *reh'g denied* (Apr. 25, 1988) (holding *Scheiner* decision applicable prospectively not from the date of that decision but from August 14, 1987, the date Justice Blackmun ordered the contested taxes be placed in escrow. 108 S. Ct. 2 (1987)); *American Trucking Associations v. Goldstein*, No. 87182090/CE67934 (Md. Cir. Ct. Oct. 23, 1987), *appeal docketed*, No. 162 (Md. Ct. App.) (holding that Maryland decal fee is unconstitutional under *Scheiner* decision applicable prospectively from July 1, 1988 to allow state collection through current fiscal year). *But see American Truck-*

ing Associations, Inc. v. Conway, No. S-147-86WnC (Vt. Super. Ct. Feb. 11, 1988), *appeal docketed* No. 88-156 (Vt. Sup. Ct.) (holding that Vermont truck decal tax unconstitutional flat tax under *Scheiner* not applied prospectively since issue had been resolved in state courts in 1983 and thus taxpayers entitled to refund of escrowed tax payments).

In *Division of Alcoholic Beverages, et al. v. McKesson*, No. 70,368 (Fla. Sup. Ct. Feb. 18, 1988), the Florida Supreme Court held that although Florida's tax preferred treatment for alcoholic beverages made from Florida's crops is improper under *Bacchus Imports Ltd. v. Dias*, 468 U.S. 263 (1984), the holding is "prospective" because of Florida's alleged "good faith reliance on a presumptively valid statute". *McKesson* is on all fours with *Bacchus*. Therefore, if the Court's *Chevron* standards were correctly applied, there would obviously be no "new principle of law" and no "presumptively valid" statute.

McKesson, Ashland Oil, American Trucking Associations, and particularly the case at hand vividly illustrate the lack of respect for precedent which is sweeping through the Nation's state tax departments.

Other States—including Michigan, Ohio, North Dakota and New Jersey—have also recently denied refunds to taxpayers by giving a decisional state or local tax rule prospective operation only. *Penn Mutual Life Ins. v. Department of Licensing & Regulation of the State of Michigan*, 412 N.W.2d 668 (Mich. Ct. App. 1987); *OAMCO v. Lindley*, 493 N.E.2d 1345 (Ohio 1986), *aff'd on reh'g*, 500 N.E.2d 1379 (Ohio 1987), *clarified, substituted op., in part*, 503 N.E.2d 1388 (Ohio 1987); *Metropolitan Life Ins. Co. v. North Dakota*, 373 N.W.2d 399 (N.D. 1985); *Salorio v. Glaser*, 461 A.2d 1100 (N.J. 1983), *cert. denied*, 464 U.S. 993 (1983).

Until the past five years, States and taxpayers generally recognized that holdings were not prospective and that similarly-situated taxpayers were entitled to equal protection under the law. There was an understanding that a test case would go forward and others would be held in abeyance. If a State won the test case, it would win similar cases. If it lost the test case, it would lose similar cases.

Many States now want to win if they win and win if they lose. They want to apply unfavorable judicial decisions on a prospective basis, thereby allowing them to retain revenues collected under unconstitutional laws and continue to collect revenues under those laws for periods prior to a court's holding of unconstitutionality. The retention of unconstitutional taxes violates the Constitution. The collection of unconstitutional taxes violates the Constitution. *See Carpenter v. Shaw*, 280 U.S. 363 (1930); *United States v. State Tax Commission of Mississippi*, 645 F.2d 4 (5th Cir. 1981), *cert. denied*, 454 U.S. 896 (1981). This wave of unconstitutional "prospective only" holdings is affecting our member companies in many parts of this Nation. COST is, therefore, vitally interested in this case.

SUMMARY OF ARGUMENT

This Court's decision in *Tyler Pipe Company v. Washington Department of Revenue*, holding the multiple activities exemption of the Washington B&O tax to be unconstitutionally discriminatory, was erroneously given "pure prospective" application by the Washington Supreme Court.

ARGUMENT

I. Discrimination Against Interstate Commerce is Unconstitutional

It has long been clear that the Commerce Clause prohibits taxes which favor local business over interstate commerce. *See Boston Stock Exchange v. State Tax Commisison*, 429 U.S. 318 (1977); *Maryland v. Louisiana*, 451 U.S. 725 (1981); *Westinghouse Electric Corp. v. Tully*, 466 U.S. 388 (1984); *Bacchus Imports, Ltd. v. Dias*, 468 U.S. 263 (1984); *Armco, Inc. v. Hardesty*, 467 U.S. 638 (1984); and *American Trucking Associations v. Scheiner*, 107 S.Ct. 2829 (1987). Despite the clarity of this principle, attempts to circumvent it are limited only by the imagination and the energy of state tax collectors.

II. The Washington B&O Tax

The Washington B&O Tax has been discriminating against interstate commerce for over 50 years. In 1948, the Washington Supreme Court held that the then-version of the tax's wholesale tax exemption for local manufacturers discriminated against interstate commerce and therefore violated the Commerce Clause of the Federal Constitution. *Columbia Steel Co. v. State*, 192 P.2d 976 (1948). In 1950, the Washington legislature made the first of several "quick fixes". That fix was described by this Court in *Tyler Pipe*, as follows (107 S.Ct. at 2814):

> "Two years later, in 1950, the Washington legislature responded to this ruling by turning the B & O tax exemption scheme inside out. The legislature removed the wholesale tax exemption for local manufacturers and replaced it with an exemption from the manufacturing tax for the portion of manufacturers' output that is subject to the wholesale tax. The result, as before 1950, is that local manufacturers pay the manufacturing tax on their interstate sales and out-of-state manufacturers pay the wholesale tax on their sales in Washington. Local manufacturer-whole-

> salers continue to pay only one gross receipts tax, but it is now applied to the activity of wholesaling rather than the activity of manufacturing." [Footnote deleted.]

III. ARMCO, Inc.

Armco, Inc. v. Hardesty, 467 U.S. 638 (1984), involved a West Virginia tax identical in principle to the Washington B & O tax. West Virginia imposed a gross receipts tax on persons selling tangible property at wholesale. Local manufacturers were exempt from the tax because they paid a manufacturing tax on the value of products manufactured in West Virginia. This Court held that their exemption from the wholesale tax violated the principle that "a State may not tax a transaction or incident more heavily when it crosses state lines than when it occurs entirely within the State." 467 U.S. at 642.

IV. The Tyler Pipe Case

On June 14, 1984, two days after *Armco* was decided by this Court, Washington's Director of Revenue wrote to Washington's Governor about the likely impact of *Armco* on Washington's B&O tax. Relying on advice from the Attorney General's office, the Director stated, in pertinent part:

> "In the opinion of our attorneys the reasoning of the Court in the *Armco* decision is clearly applicable to our statutory arrangement. . . ." J.S. App.F 80a.

That advice was ignored. The consolidated action now before this Court was commenced and the seventy-one taxpayers consolidated in this proceeding filed actions for refunds. Anticipating a "prospective only" position by the appellee, they argued for an injunction against the collection of future taxes. The appellee argued that an injunction was unnecessary because the appellants had the right to refunds (refunds which the appellee and the Washington Supreme Court now refuse to grant). An

injunction was not obtained. In fact, Tyler Pipe had earlier been unsuccessful in its efforts before the Washington Supreme Court to obtain an injunction. *See Tyler Pipe Industries, Inc. v. Department of Revenue,* 638 P.2d 1213 (1982).

On June 23, 1987, this Court issued its opinion in *Tyler Pipe* and stated as follows:

> "We conclude that Washington's multiple activities exemption discriminates against interstate commerce as did the tax struck down by the Washington Supreme Court in 1948 and the West Virginia tax that we invalidated in *Armco.* The current B & O tax exposes manufacturing or selling activity outside the state to a multiple burden from which only the activity of manufacturing in-state and selling in-state is exempt. 107 S.Ct. at 2820.
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> * * *
>
> Our holding that Washington's tax exemption for a local manufacturer-wholesaler violates the Commerce Clause disposes of the issues raised by those appellants in *National Can* that manufacture goods in Washington and sell them outside the State, as well as the claim of discrimination asserted by those appellants that manufacture goods outside Washington and sell them within the State. 107 S.Ct. at 2821.
>
> * * *
>
> The Department of Revenue argues that any adverse decision in these cases should not be applied retroactively because the taxes at issue were assessed prior to our opinion in *Armco* and *the holding in that case* was not clearly foreshadowed by earlier opinions. See *Chevron Oil Co. v. Huson,* 404 U.S. 97, 106-107 (1971). [Emphasis supplied.] 107 S.Ct. at 2822.
>
> * * *
>
> We conclude that it is likewise appropriate for the Supreme Court of Washington to address *in the first instance* the refund issues raised by our rulings in these cases." [Emphasis supplied.] 107 S.Ct. at 2823.

On January 28, 1988, the Washington Supreme Court concluded in *National Can* that "pure" prospective application of this Court's *Tyler Pipe* decision from June 23, 1987 is "appropriate" for the following reasons:

> "The threshold factor necessary for prospective application is a finding that the *Tyler* decision established a new principle of law overruling past precedent on which the litigants may have relied. *Chevron Oil*, 404 U.S. at 106, 92 S.Ct. at 355. *This court's unanimous decisions* in *National Can* and *Tyler Pipe*, the long line of [Washington Supreme Court] cases upholding the Washington B&O tax, the fact that *Tyler* overruled past precedent on which the states may have relied, and Justice Scalia's dissent in *Tyler*, all compel the conclusion that *Tyler* did establish new principles of law. [Emphasis supplied.] 749 P.2d at 1288.
>
> * * *
>
> Taxpayer Tyler Pipe argues that, because the State argued against an injunction for the collection of taxes pending resolution of the constitutionality of the B & O tax, it now has an absolute right to a refund under the Washington refund statutes. This court denied the requested injunction not only because a remedy at law existed but also because Tyler Pipe failed to make the requisite showing of a likelihood of success on the merits. *Tyler Pipe Indus., Inc. v. Department of Rev.*, 96 Wn.2d 785, 794, 638 P.2d 1213 (1982). *The fact that the State argued that taxpayers had an adequate remedy at law in the form of a possible refund should not mean the State is foreclosed from arguing that such a refund is not* (under applicable preexisting law) *now owed to the taxpayers.* Because under Washington law a refund suit constitutes an adequate legal remedy foreclosing a preliminary injunction, it does not mean a successful taxpayer necessarily is entitled to retroactive application of his case." [Emphasis supplied.] 749 P.2d at 1292.

V. Attempts to Circumvent Commerce Clause Holdings

The message from many state departments of revenue and many state courts is loud and clear—if a court's holding involves large potential refunds for many taxpayers, it is probable that no refunds will be granted. If *Chevron* allows the tax collector to determine what is and what is not a "new principle of law" and what is and what is not an "inequity", holdings adverse to the tax collector will be considered new principles of law and large potential refunds will be considered inequitable. The record will be ignored. Legal advice will be ignored. Tax collectors' own arguments against injunctions will be ignored. This Court's opinions will be treated as advisory opinions which do not have to be followed.

With respect to the "inequity" point in *Chevron*, we submit that the proper analysis was stated in *American Trucking Associations v. Conway*, No. S-147-86WnC, (Vt. Super. Ct. Feb. 11, 1988), *appeal docketed* No. 88-156 (Vt. Sup. Ct.), an opinion which denied Vermont's attempt to impose a "prospective only" determination on the application of *American Trucking Associations v. Scheiner*, 107 S.Ct. 2829 (1987). The Vermont court stated:

> "What is conclusive is that the plaintiffs paid an illegal tax. They have standing to complain about it, and the court has power to refund it to them. The defendants' windfall argument cuts both ways—the issue is whether it is fairer to give the money to the plaintiffs, who may have been able to pass on the costs of the tax to consumers, or to the state, which after notice of the unconstitutionality of the tax nonetheless put it into place. *Equity supports giving that windfall, if it exists, to the wronged plaintiffs. Comparative need is not a factor to be considered.*" [Emphasis supplied.] No. S-147-86WnC, slip op. at 5.

VI. The States are Divided

Vermont, New York and Iowa (*See Burlington Northern Railroad Co. v. Board of Supervisors*, 418 N.W.2d 72 (Iowa 1988))—consistent with the position of the *majority* of the States—take the high road and apply court decisions equally to similarly situated taxpayers for open years. Arkansas, Florida, Maryland, Michigan, New Jersey, North Dakota, New York City, Ohio, Oklahoma, Washington and West Virginia are among the increasing number of States which have recently taken the low road and declared the emergence of "new principles of law" when the dollars involved are substantial. This is a disturbing trend. The Court should resolve this conflict as soon as possible.

VII. *Griffith v. Kentucky*

There should be a better way. Consideration should be given to replacing the *Chevron* standards with the criminal case principles of *Griffith v. Kentucky*, 107 S.Ct. 708 (1987). In that opinion, this Court stated:

> "failure to apply a newly declared constitutional rule to criminal cases pending on direct review violates basic norms of constitutional adjudication. First, it is settled principle that this Court adjudicates only "cases" and "controversies." See U.S. Const., Art. III, § 2. Unlike a legislature, we do not promulgate new rules of constitutional criminal procedure on a broad basis. Rather, the nature of judicial review requires that we adjudicate specific cases, and each case usually becomes the vehicle for announcement of a new rule. But after we have decided a new rule in the case selected, *the integrity of judicial review requires that we apply that rule to all similar cases pending on direct review.* Justice Harlan observed:
>
> > 'If we do not resolve all cases before us on direct review in light of our best understanding of governing constitutional principles, it is dif-

> ficult to see why we should so adjudicate any case at all. . . .'
>
> * * * *
>
> As a practical matter, of course, we cannot hear each case pending on direct review and apply the new rule. But *we fulfill our judicial responsibility by instructing the lower courts to apply the new rule retroactively to cases not yet final.* Thus, it is the nature of judicial review that precludes us from '[s]imply fishing one case from the stream of appellate review, using it as a vehicle for pronouncing new constitutional standards, and then permitting a stream of similar cases subsequently to flow by unaffected by that new rule.'
>
> Second, *selective application of new rules violates the principle of treating similarly situated defendants the same.* As we pointed out in *United States v. Johnson*, the problem with not applying new rules to cases pending on direct review is 'the *actual inequity* that results when the Court chooses which of many similarly situated defendants should be the chance beneficiary' of a new rule. (emphasis in original). Although the Court had tolerated this inequity for a time by not applying new rules retroactively to cases on direct review, we noted: 'The time for toleration has come to an end.' [Citations deleted; emphasis supplied.] 107 S.Ct. at 714.

The rationale of this Court in *Griffith* for eliminating deviating retrospective rules applies equally here. As one noted commentator has observed: "Since many state courts have applied their own standards to determine retroactivity of a decision holding a state tax unconstitutional, the issue would seem to cry out for clarification by the Court." [1]

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[1] Tatarowicz, *Right to a Refund for Unconstitutionally Discriminatory State Taxes and Other Controversial State Tax Issues Under the Commerce Clause*, A.B.A. Tax Lawyer, Fall 1987, at 103, 141 (footnote omitted).

CONCLUSION

For the foregoing reasons, COST urges this Court to note probable jurisdiction in the present case and give plenary consideration to the questions discussed in Appellant's Jurisdictional Statement.

Dated: April 29, 1988

Respectfully submitted,

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No. 87-1629

IN THE
Supreme Court of the United States
OCTOBER TERM, 1987

NATIONAL CAN CORPORATION, *et al.*,
Appellants,

v.

STATE OF WASHINGTON DEPARTMENT OF REVENUE,
Appellee.

On Appeal from the Supreme Court of Washington

BRIEF OPPOSING MOTION TO DISMISS OR AFFIRM

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TABLE OF AUTHORITIES

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1. The State is wrong in its assertion that Article III principles, repeatedly recognized in criminal cases, have no application to civil cases. The State asserts, without authority, that different Article III standards apply in civil and criminal cases. (Motion at 23.) The underlying imperative of Article III and the separation of powers doctrine permit no such distinction. Nor has this Court suggested one would be appropriate. *See* J.S. at 8; Brief of Amici Curiae American Sign & Indicator Corp., *et al.*, at 8-10.

2. The State's argument that Tyler is not advisory because it "applies prospectively" "to appellants' refund

claims" is a contradiction in terms. (*See* Motion at 22.) A decision limited to pure prospective application is, by definition, mere dictum. *Stovall v. Denno*, 388 U.S. 293, 301 (1967). Such a decision does not determine the rights and obligations immediately at issue in the case. *James v. United States*, 366 U.S. 213, 225 (1961) (Harlan, J., concurring) (in light of the inherent restraints imposed by Article III, this Court's "decisions in the tax field" must be given retroactive effect as "the normal concomitant of the fact that [the Supreme Court does] not sit as an administrative agency making rulings for the future, but rather adjudicate[s] actual controversies as to the rights and liabilities under the laws of the United States.").

3. The cases cited by the State do not suggest that pure prospective application of this Court's Tyler decision is consistent with Article III. The declaratory judgment actions cited by the State (Motion at 21-23),[1] all satisfy Article III's case or controversy requirement. In each case, the parties' rights were determined by a judgment applying the rule of decision directly to the parties —the prevailing party obtained the relief it requested. By contrast, the taxpayers here, despite having prevailed in *Tyler*, have been denied on remand the recovery of discriminatory taxes that was the very controversy in *Tyler*.

In particular, *Lemon II* and *Norris*, chiefly relied upon by the State, do not support the proposition that this

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[1] *Boston Stock Exchange v. State Tax Commission*, 429 U.S. 318 (1977); *Nashville, Chattanooga and St. Louis Railway v. Wallace*, 288 U.S. 249 (1933); *Department of Revenue of the State of Washington v. Association of Washington Stevedoring Companies*, 435 U.S. 734 (1978).

Lemon v. Kurtzman, 411 U.S. 192 (1978) ("Lemon II"), and *Arizona Governing Committee for Tax Deferred Annuity and Deferred Compensation Plans v. Norris*, 463 U.S. 1073 (1983), also are properly viewed as declaratory judgment cases.

Court's decisions can be applied *purely* prospectively. In both those cases, the prevailing plaintiffs were awarded the remedy they had requested—declaratory relief in *Lemon II* and an award under 42 U.S.C. § 2000e-5(g) in *Norris*. In *Lemon II*, this Court ruled that plaintiffs' early abandonment of their preliminary injunction claim operated as a waiver estopping plaintiffs from reasserting that claim after they had obtained a favorable judgment in *Lemon I*. 411 U.S. at 196, 204-05. Accordingly, plaintiffs had no claim to enjoin the State from making payments for educational services rendered prior to entry of final judgment.

This Court's decision in *Norris* likewise was not purely prospective. The prevailing plaintiffs received an affirmative award on two out of three of the components of their prayer for relief (declaratory judgment and a permanent injunction). Judgment was awarded the plaintiffs under the statutory section on which they had based their claim, 42 U.S.C. § 2000e-5(g).[2] Analysis of the appropriate remedy in *Norris* focused on the district court's abuse of discretion in formulating retroactive relief. 463 U.S. at 1105-07. Title VII expressly delegates to the federal courts the authority to fashion "any . . . equitable relief the court deems appropriate." 42 U.S.C. § 2000e-5(g). Title VII's broad range of permissible relief is in marked contrast to the mandatory refunds Washington law prescribes as the *exclusive* remedy for the taxes this Court held unconstitutional in *Tyler*. *See* Wash. Rev. Code §§ 82.32.060; 82.32.180; J.S. App. 25a. *Norris*, then, does not involve the article III concerns

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[2] 42 U.S.C. § 2000e-5(g) provides, in relevant part, as follows:

> If the court finds that the respondent has engaged in . . . an unlawful employment practice . . . the court may enjoin the respondent from engaging in such unlawful employment practice, and order such affirmative action as may be appropriate, . . . or any other equitable relief as the court deems appropriate. . . .

presented here, but is limited to an evaluation of the competing equity interests in framing a remedy consistent with federal civil rights policy. *Norris*, 463 U.S. at 1105-07; *accord Albemarle Paper Co. v. Moody*, 422 U.S. 405, 415-18 (1975).

Nor was a federal rule of pure prospectivity formulated in *Great Northern Ry v. Sunburst Oil & Ref. Co.*, 287 358 (1932), as the State asserts. Unlike Article III courts, state courts may be permitted by state constitutions to issue advisory opinions on matters limited exclusively to state law issues. *Id.* at 364. In contrast, the court below was obliged by the Supremacy Clause to implement this Court's Commerce Clause decision in *Tyler*. *See* Tatarowicz, *Right to a Refund for Unconstitutionally Discriminatory State Taxes and Other Controversial State Tax Issues Under the Commerce Clause*, 41 Tax Lawyer 103, 117-29 (1988).

4. The State's Motion fails to address the threshold issue of whether Chevron can apply even if this Court had established a new principle of law in Tyler. A *Chevron* analysis is appropriate only in "second generation" litigation, not in the case that actually formulates the new principle of law. The State fails to acknowledge that *Chevron* considered only whether the new rule announced in *Rodrigue v. Aetna Casualty & Surety Co.*, 395 U.S. 852 (1969), should be applied retroactively to the similarly-situated *Chevron* litigants.[3] *Chevron*, properly applied, does not undermine the Article III principle. To condone the lower court's pretext would set a dangerous precedent permitting denial of refunds whenever a state's tax scheme abridges federal constitutional rights. This threat merits the Court's review.

5. The issue on appeal is the taxpayers' right to judicial relief on the tax refund claims presented in Tyler,

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[3] *Chevron Oil Co. v. Huson*, 404 U.S. 97, 105-09 (1971).

not the effect of post-Tyler legislation. The State's motion digresses to discuss new Washington legislation enacted after *Tyler* was decided. (Motion at 2-3.) Subsequent state legislation enacted in response to *Tyler* is not relevant to Article III principles assuring that this Court decide the controversy before it—in *Tyler*, the taxpayers' claim to recover the unconstitutional taxes collected by the State.[4]

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[4] In its degression, the State argues that it has now enacted a "new system of credits" that operates to "eliminate any possibility of a multiple burden as a result of duplicate taxes imposed by another jurisdiction." (Motion at 3.) Even if that were relevant, this Court should harbor no such illusions.

In proposing the legislation, the Washington Department of Revenue assured its legislature that interstate manufacturers, whose burden under the scheme invalidated in *Tyler* was expected to be $882 million during the current biennium, would receive only a small fraction of that amount in "credits"—by the latest estimate, less than one tenth. Report of Legislative-Executive Committee on *National Can* Alternatives, S.B. 6078, July 28, 1987. The State rejected "fair apportionment" (via the 3-factor formula that the Court has recognized as the prevailing standard) as too costly. The State found unpalatable the economic cost to reduce the interstate taxpayers' burden to their "fair share", and the need of "shifting of taxes from out-of-state manufacturers" to in-state manufacturers. *Id.*

The new credits are a facade intended to avoid that cost. They do nothing to eliminate the *actual* multiple burden proved in this case by these taxpayers. J.S. of National Can Corp., *et al.*, App. I-3 ¶ 14 & I-4 ¶15, *decided sub. nom. Tyler Pipe Industries, Inc. v. Washington State Department of Revenue*, 107 S. Ct. 2810 (1987). The credits are so narrowly drawn that they have, as Washington's legislature intended, minimal operative effect.

Although the new tax has already been challenged (Motion at 3, n.1), the State *once again* is positioning itself to profit from its discrimination. If the new formalisms are ultimately struck down, Washington will, based on the precedent of the decision below, apply any invalidating decision prospectively. The new form of discrimination will have been profitable and risk free in the interim.

6. Tyler, and the State's own admission, contradict the State's argument under Chevron's "reliance factor." Addressing *Chevron's* first prong—which it calls the "reliance factor"—the State labors to argue that *Tyler* "established a new principle of law by overruling past precedent on which the State had justifiably relied." (Motion at 8-16.) But the State has admitted that it did not rely —indeed, that it anticipated *Tyler*: "the *Armco* decision is clearly applicable to our statutory arrangement." J.S. App. 80a.

Tyler itself makes eminently clear that its holding was the product of evolution—an "extension of doctrines that had been growing and developing over the years." *Hanover Shoe, Inc. v. United Shoe Machinery Corp.*, 392 U.S. 481, 499 (1968). *Tyler* repeatedly expressed a concern for earlier precedent: "*General Motors* is *not* a controlling *precedent* . . . , the result in that case did not depend on the Court's resolution of whether the tax burdened interstate commerce." (107 S.Ct. at 2817); "the State's justification for thus taxing the manufacture of goods in interstate commerce, however, *fails under our precedents*." (*id.* at 2818); "Washington's B&O tax scheme is therefore *inconsistent with our precedents*" (*id.* at 2820) (emphasis added).

In particular, *Tyler* left no doubt that it added no new "principle" to the rationale of *Armco*. On the contrary, *Tyler* pointedly relied on past precedent culminating in *Armco*.[5]

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[5] "We conclude that our reasons for invalidating the West Virginia tax in *Armco* also apply to the Washington tax" (107 S. Ct. at 2813); "This statutory exemption . . . has the same facially discriminatory consequences as the West Virginia exemption we invalidated in *Armco*" (*id.* at 2816); "Our square reliance in *Armco* on Justice Goldberg's earlier dissenting opinion . . . dooms appellee's efforts" (*id.* at 2817); "*Armco* requires that we now agree . . . that the exemption before us is the practical equivalent of the ex-

7. The State's own argument demonstrates that the treatment of Chevron's "purpose" and "equity" tests by the Court below will guarantee to states the fruits of their discrimination. The State's Motion confirms that the decision below would reduce *Chevron's* "purpose" and "equity" requirements to a meaningless level—allowing states to profit from their discrimination against interstate commerce in virtually every case. The contradiction inherent in the State's argument is apparent from the rationale offered: "whatever chill was imposed on interstate trade was in the past." (Motion at 16, *quoting* J.S. App. 11a.) Discriminatory action—by necessity—is *always* in the past by the time this Court addresses a taxpayer's claim for refund. Does that mean that Commerce Clause policy is furthered by allowing the State to keep the discriminatory taxes? If this Court were to acquiesce, its message to Washington and other states would be that they run no risk in continuing to impose discriminatory taxes, because they can keep the fruits, just as if discrimination were not forbidden by the Constitution. To be sure, in the rare case fortunate enough to reach this Court, the State will be admonished, "you discriminated and you shouldn't." But, as surely as actions speak louder than words, the message that the states will receive and remember—and act upon—will be, "You can keep the fruits of your discrimination."

Thus, the decision below is sure to foster aggressive state behavior and discourage challenges to unconstitutional taxes—with a resulting chill on interstate trade for years to come.

Likewise, in every action for the refund of discriminatory taxes, the State will have spent the money at issue. If that is treated as a hardship that justifies non-

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emption that the Washington Supreme Court invalidated in 1948," (*id.* at 2817); "We conclude, as we did in *Armco*, that manufacturing and wholesaling are not 'substantially equivalent events'" (*id.* at 2818).

retroactivity, states will always be permitted to retain the fruits of their discrimination.

CONCLUSION

For the reasons discussed, as well as the reasons stated by amici—American Sign & Indicator Corp., *et al.*; Institute of Property Taxation; Committee on State Taxation of the Council of State Chambers of Commerce; and Tax Executives Institute, Inc.—this Court should note probable jurisdiction.

Respectfully submitted,

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